(19)

No. 95-1441-CFX Title: Linda J. Blessing, Director, Arizona Department of Economic Security, Petitioner
v.
Cathy Freestone, etc., et al.

Docketed:
March 11, 1996 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Mar 8 1996	Petition for writ of certiorari filed. (Response due April 10, 1996)
	Mar 28 1996	Brief of respondents Cathy Freestone, et al. in opposition filed.
	Apr 10 1996	Brief amici curiae of Hawaii, et al. filed.
	Apr 16 1996	Reply brief of petitioner Linda Blessing filed.
	Apr 17 1996	DISTRIBUTED. May 10, 1996
	May 13 1996	Petition GRANTED. SET FOR ARGUMENT January 6, 1997. **********
	Jun 3 1996	Order extending time to file brief of petitioner on the merits until July 26, 1996.
	Jul 25 1996	Brief amici curiae of American Public Welfare Association, et al. filed.
	Jul 26 1996	Brief amici curiae of Council of State Governments, et al. filed.
	Jul 26 1996	Brief amici curiae of National District Attorneys Association, et al. filed.
	Jul 26 1996	Joint appendix filed.
	Jul 26 1996	Brief of petitioner Linda J. Blessing, Director filed.
	Jul 26 1996	Brief amici curiae of Illinois, et al. filed.
	Jul 31 1996	Order extending time to file brief of respondent on the merits until September 27, 1996.
	Aug 30 1996	Record filed.
	Sep 6 1996	Record filed.
	Sep 13 1996	Motion of respondents to remand or dismiss certiorari as improvidently granted in light of P.L. No. 104-193 filed.
	Sep 20 1996	Response to motion requested. Due September 25, 1996.
	Sep 25 1996	Opposition of petitioner to motion of respondents filed.
	Sep 27 1996	Brief of respondents in reply to petitioner's opposition to motion filed.
	Oct 3 1996	Motion of respondents to remand or dismiss certiorari as improvidently granted in light of P.L. No. 104-193 DENIED. Motion of respondents to consider remanding this case or dismissing certiorari as improvidently granted in light of the Personal Responsibility and work Opportunity Reconciliation Act of 1996 DENIED
	Oct 3 1996	Order extending time to file brief of respondent on the merits until October 17, 1996.
	Oct 8 1996	Application (A96-261) the Acting Solicitor General for leave to file an amicus curiae brief in excess of the page limitation, submitted to Justice O'Connor.
	Oct 9 1996	Application (A96-261) denied by Justice O'Connor.
	Oct 16 1996	Brief amici curiae of National Center for Youth Law, et al.

No. 95-1441-CFX

Entry	Date	Proceedings and Orders
		filed.
	Oct 17 1996	Brief amici curiae of National Women's Law Center, et al. filed.
	Oct 17 1996	Brief of respondents Cathy Freestone, et al. filed.
	Oct 17 1996	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Oct 17 1996	Brief amicus curiae of United States filed.
	Oct 17 1996	Brief amicus curiae of Anti-Poverty Project of the Mandel Legal Aid Clinic filed.
	Nov 1 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 12 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 20 1996	CIRCULATED.
	Nov 21 1996	LODGING consisting of ten copies of the 11th Circuit brief for the Federal Appellee filed in Brown v. Ledbetter,No.87-8345, Nov. 27, 1987, received from counsel for the petitioner
	Nov 21 1996	Reply brief of petitioner Linda Blessing filed.
	Dec 30 1996	Application (A96-459) for leave to file a brief as amicus curiae in excess of the page limitations, submitted to Justice O'Connor.
	Jan 3 1997	Application (A96-459) denied by Justice O'Connor.
	Jan 6 1997	ARGUED.

95-1441

No. _____

Supreme Court, U.S.
FILED
MAR 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether custodial parents seeking child support from noncustodial parents can sue state officials under 42 U.S.C. § 1983 for alleged violations of Title IV-D child support program agreements between the States and the federal government when such suits will contravene this Court's precedents, not necessarily remedy a custodial parent's grievances, and violate core principles of federalism and separation of powers?

PARTIES TO THE PROCEEDING BELOW

Petitioner Linda J. Blessing, Director of the Arizona Department of Economic Security (hereinafter "State Director"), has succeeded Charles E. Cowan, who held that position during the proceedings below.

Respondents Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers, and Esperanza Laustaunau (hereinafter "Plaintiffs") are proposed class representatives who filed the underlying action individually, on behalf of their minor children, and on behalf of all others similarly situated.

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PETITION FOR WRIT OF CERTIORARI

The State Director respectfully petitions for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The court of appeals opinion is reported at 68 F.3d 1141. Appendix ("App.") A. The judgment of the United States District Court for the District of Arizona granting summary judgment in favor of the State Director and against Plaintiffs is not reported. App. B.

STATEMENT OF JURISDICTION

On October 12, 1995, the court of appeals entered the judgment from which review is sought. App. A. On December 12, 1995, the court denied rehearing. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This matter involves the following statutory and regulatory provisions:

42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The pertinent text of Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 601-617 and 651-669, and the associated regulations, namely 42 U.S.C. §§ 602(a)(27), 603(h), and 652, and 45 C.F.R. §§ 302.33, 305.20(a)(3), and 305.99, are reproduced in Appendices D and E.

STATEMENT OF THE CASE

The court of appeals decision authorizes over three million custodial parents residing throughout the Ninth Circuit to sue state officials to enforce federal regulations governing the States' receipt of federal funds to operate state child support enforcement programs pursuant to Title IV-D of the Social Security Act. In opening this floodgate of potential litigation, the court of appeals acknowledged that its decision squarely conflicts with decisions of the Sixth and Eleventh Circuits. App. 10-11a. The decision also conflicts with this Court's decisions by, among other things, dispensing with the fundamental elements of standing required by Article III of the Constitution and ignoring the principle of unambiguous notice of conditions on the grant of federal funds underlying *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Suter v. Artist M.*, 503 U.S. 347 (1992). Finally, the decision thwarts the purposes behind § 1983 and Title

IV-D, and undermines the core principles of federalism and separation of powers. For these reasons, the decision below cries out for review by this Court.

Statutory Background

Title IV-A of the Social Security Act governs the federal Aid to Families with Dependent Children ("AFDC") program. 42 U.S.C. §§ 601-617. In 1975, Congress amended Title IV-A to require that States, as a condition of receiving AFDC funds, adopt state plans to provide child support collection services. 42 U.S.C. § 602(a)(27). At the same time, Congress enacted the Child Support Enforcement Act as Title IV-D of the Social Security Act, which established (i) the requirements that States must meet in creating and administering child support enforcement plans (including establishment of paternity, location of absent parents, establishment and enforcement of child support orders, and collection of child support arrears) and certain spousal maintenance support and medical support plans (collectively "child support enforcement"), and (ii) the duties that the Secretary must fulfill in monitoring such plans. 42 U.S.C. §§ 651-669.

Congress did not explicitly or implicitly authorize a private right of action to enforce the provisions of these acts. To the contrary, Congress expressly granted enforcement authority to the Secretary of the United States Department of Health and Human Services ("Secretary"), who is charged with regulating and auditing each participating State's Title IV-D program to ensure compliance with the statutory schemes. 42 U.S.C. § 652. Congress also

authorized the Secretary to impose a fiscal penalty of up to five percent of the federal funding for a State's AFDC program if a State failed to develop a child support enforcement plan that complied with federal laws and regulations. 42 U.S.C. § 603(h).

Since 1975, Title IV-D and its associated regulations have undergone substantial changes that have significantly expanded the States' responsibilities. States now must provide Title IV-D services not only to custodial parents who receive public assistance, but also to those who do not. *See* 42 U.S.C. § 654(6); 45 C.F.R. § 302.33(a). The statutes and regulations governing the Secretary's audits of state programs also have undergone substantial change. Originally the federal government required States to be in "full compliance" with specified criteria to remain eligible for federal funding. *See* 41 Fed. Reg. 55,345-47 (1976). In 1984, Congress reduced the standard that States must satisfy in federal audits of their Title IV-D programs from "full compliance" to "substantial compliance" (or 75% compliance). 42 U.S.C. § 602(a)(27); 45 C.F.R. § 305.20(a)(3).

In 1975, the State of Arizona designated the Arizona Department of Economic Security ("ADES") as its Title IV-D agency and adopted a child support enforcement plan, which the federal government approved. Arizona's plan, like that of every other State, has been audited routinely by the Secretary for substantial compliance at least once every three years. 42 U.S.C. § 652(a)(4). If a State fails an audit, the statutory and regulatory scheme provides the State with an opportunity to cure the deficiency. *See* 42 U.S.C. § 603(h)(2)(A); 45 C.F.R. § 305.99. In response to a 1989 federal audit that identified certain

deficiencies, Arizona submitted a corrective action plan. *See* Defendant's Motion to Dismiss Plaintiffs' Complaint, Ex. A-1. The follow-up audit that the Secretary conducted after Arizona implemented its new plan found that Arizona had achieved "substantial compliance."

Proceedings Below

On February 22, 1993, Plaintiffs filed a class action complaint in the United States District Court for the District of Arizona seeking declaratory and injunctive relief under 42 U.S.C. § 1983. App. 7a. Plaintiffs did not claim money damages. The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

The five named Plaintiffs represent a proposed class of about 300,000 custodial parents in Arizona who are eligible to receive child support enforcement services from ADES under Title IV-D.[1] The proposed class includes parents who receive AFDC benefits as well as those who do not.

Plaintiffs asked the court to declare that the operation of Arizona's child support enforcement program violated rights that Title IV-D and its implementing regulations had created on their behalf and that they could enforce these rights in a § 1983 action. They also asked the court for a permanent injunction with continuing supervision to achieve and sustain substantial compliance with Title IV-D.

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[1] The Complaint alleged in 1993 that approximately 275,000 Title IV-D cases existed. The Secretary's published figures for 1994 put the number at 307,060 open case files. (*See* n.9, *infra*.) The number fluctuates constantly as ADES closes existing cases and new custodial parents request services.

The State Director filed a motion to dismiss, which the district court treated as a motion for summary judgment. App. 4b. The district court granted summary judgment in favor of the State Director and against Plaintiffs, relying upon the reasoning in *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), that Congress had foreclosed a private judicial remedy in Title IV-D. Plaintiffs appealed to the Ninth Circuit pursuant to 28 U.S.C. § 1291.

A divided panel of the court of appeals reversed the district court's decision. The majority acknowledged the considerable tension between the approach that this Court took in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and the analysis that it applied in *Suter v. Artist M.*, 503 U.S. 347 (1992). App. 12a. The panel also candidly recognized that "federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D." App. 2a. The majority nevertheless held that Title IV-D confers broad rights upon all custodial parents seeking child support to enforce state officials' compliance with federal requirements through the vehicle of § 1983.

Judge Kleinfeld dissented. In attempting to reconcile *Suter* and *Wilder*, he concluded that this case is closer to *Suter*. He found the "substantial compliance" standard to be inconsistent with the creation of an "unambiguous" right of any individual to enforce Title IV-D. Indeed, he argued that, unlike the case[2] in which the First Circuit held that § 1983 was available to enforce Title IV-D where

[2] *Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258 (1st Cir. 1993).

the plaintiffs' claims were narrower and designed to obtain immediate monetary relief, the enforcement action in this case was "designed to change social policy, not to get something for a client." App. 44a. Accordingly, he concluded that it was completely "speculative" whether Plaintiffs would receive any "concrete benefit" from a declaration that state officials were not fulfilling their federal responsibilities under Title IV-D.

REASONS TO GRANT THE PETITION

It is difficult to imagine a case more worthy of review by this Court. The legal theory underlying § 1983's proper role in enforcing federal statutory and regulatory obligations is in disarray. The judicial task of reconciling *Suter* and *Pennhurst* with *Wilder* and *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), can authoritatively be undertaken only by this Court. The present doctrinal vacuum explains the dizzying array of conflicting approaches to deciding whether Title IV-D can be enforced through § 1983. Moreover, the decision under review exposes officials in the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington to § 1983 claims by more than three million custodial parents seeking child support. The time has come for the Court to decide the general availability of § 1983 to enforce federal nonconstitutional rights and the specific availability of § 1983 to enforce the regulations implementing Title IV-D in actions against state officials.

1. Decisions of the Circuit Court of Appeals Are in Hopeless Conflict, and the Rationales of the Various Lower Court Decisions Are Splintered.

Certiorari is warranted to resolve the immediate and acknowledged conflict among the circuits on the precise Title IV-D issue presented in this case.

Several decisions of the court of appeals conflict. The Sixth and Eleventh Circuits have refused to allow private § 1983 actions to enforce Title IV-D. *See Carelli v. Howser*, 923 F.2d 1208, 1211, 1213-16 (6th Cir. 1991) (holding that Title IV-D created enforceable rights in the class of parents eligible for child support enforcement services, but concluding that Title IV-D's comprehensive audit scheme foreclosed private enforcement); *Wehunt v. Ledbetter*, 875 F.2d 1558, 1565-66 (11th Cir. 1989) (holding that Title IV-D did not create enforceable rights in proposed class of custodial parents because Congress did not enact Title IV-D to benefit such parents by providing legal assistance, but to benefit society as a whole by facilitating recoupment of welfare payments and reduction of welfare roles), *cert. denied sub nom. Brown v. Ledbetter*, 494 U.S. 1027 (1990). The Ninth Circuit opinion at bar joins decisions by the First and Eighth Circuits that have allowed private causes of action against state officials. *See Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 269 (1st Cir. 1993) (holding that Title IV-D created enforceable rights in plaintiff class to receive "pass-through" and "gap" payments from the State's child support collections within time frames that Titles IV-A and IV-D and their implementing regulations established); *Howe v. Ellenbecker*, 8 F.3d 1258, 1262-63 (8th Cir. 1993) (holding that Title IV-D created enforceable rights to child support

enforcement services in class of custodial parents whose children's absent parents lived on Indian reservations and affirming order that state and federal governments negotiate cooperative agreement permitting provision of such services with Indian tribes in question), *cert. denied*, 114 S. Ct. 1373 (1994).

The rationales of these opinions and those by district courts and a state court of last resort splinter into several categories. Indeed, the majority panel openly acknowledged that "there is a three-way split of authority as to the availability of a § 1983 action to enforce Title IV-D": (i) no enforceable rights exist under Title IV-D;[3] (ii) an enforceable right exists, but the comprehensive enforcement scheme precludes a § 1983 action;[4] and (iii) a private

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[3] *Wehunt*, 875 F.2d at 1565-66; *see also Mason v. Bradley*, 789 F. Supp. 273, 276-77 (N.D. Ill. 1992) (declining to find that Title IV-D created enforceable rights to timely provision of child support enforcement services to individual plaintiff because Title IV-D required only substantial compliance and therefore did not mandate that every applicant be provided with prompt service); *Oliphant v. Bradley*, No. 91-C-3055, 1992 U.S. Dist. LEXIS 8975 (N.D. Ill. Feb. 19, 1992) (ruling that Title IV-D did not create enforceable rights to effective, prompt child support enforcement services in all AFDC recipients because Title IV-D did not impose binding obligations on the States in that a State's participation in the AFDC program was voluntary, Title IV-D's 75% compliance standard did not require a State to provide optimal services to each AFDC recipient, and the Secretary's broad oversight responsibilities demonstrated congressional intent to foreclose private enforcement of Title IV-D).

[4] *Carelli*, 923 F.2d at 1210-11, 1213-16. Interestingly, Tennessee is located in the Sixth Circuit, yet its highest court's decision on this federal question conflicts with the Sixth Circuit's decision. *See Davis v. McClaran*, 909 S.W.2d 412, 420

cause of action exists under § 1983 to enforce Title IV-D.[5] App. 10-11a. Thus, the conflict and confusion on this important federal question become hopeless to resolve without review by this Court.

In this case, two federal judges (the court of appeals majority) would allow a private right of action, whereas two other federal judges (the dissenter and the district court judge) would not. Given the massive consequences – as many as 300,000 potential new litigants in Arizona alone, the inevitable judicial appointment of a Special Master to duplicate the oversight of the Secretary, and the tremendous diversion of scarce public resources from the task of delivering services – this Court should give direction to the Ninth Circuit and other courts.

(Tenn. 1995) (holding that Title IV-D created an enforceable right to child support enforcement services in class of custodial parents and that parents could bring individual actions to enforce a State's "direct obligations" to them under Title IV-D regardless of whether the State was in substantial compliance with Title IV-D for audit purposes), *petition for cert. filed*, 64 U.S.L.W. 3519 (U.S. Jan. 25, 1996) (No. 95-1190).

[5] *Howe*, 8 F.3d at 1263; *Albiston*, 7 F.3d at 269; *see also King v. Bradley*, 829 F. Supp. 989, 996-97 (N.D. Ill. 1993) (holding that because Title IV-D did not create an enforceable right to receive any payments per se, but only created an enforceable right to receive services from a program that followed federally required procedures in at least 75% of cases, custodial parents could state claim for injury caused by loss of opportunity to receive child support or "pass through" payments only if State agency failed to achieve 75% compliance level); *Behunin v. Jefferson County Dep't of Social Servs.*, 744 F. Supp. 255, 257-58 (D. Colo. 1990) (holding that Title IV-D created an enforceable right to proper accounting for and distribution of court-ordered child support payments in the plaintiff class).

The Court now has two petitions pending before it that raise this important federal question: this one and Tennessee's in *McClaran v. Davis*, No. 95-1190. Now that this important question of federal law is being raised with increasing frequency and being decided in conflicting ways, it is critical for this Court to resolve it.

2. The Court of Appeals Opinion Conflicts with Relevant Decisions of This Court.

This Court's approach to deciding whether a federal statute – let alone a federal regulation – creates a right "enforceable" through 42 U.S.C. § 1983 has been in a state of flux. *Compare Wilder with Suter.* Nevertheless, a number of bedrock principles support the State Director's position in this case.

First, when Congress, acting pursuant to the Spending Clause, imposes a "condition on the grant of federal moneys" – and liability to private suit for failure to comply with the federal requirements certainly is such a condition – then Congress must impose the condition "unambiguously." *Pennhurst*, 451 U.S. at 17. By holding that a custodial parent may bring a 42 U.S.C. § 1983 action against Arizona officials to enforce Title IV-D statutes and regulations, the court of appeals has imposed a condition on Arizona that was neither unambiguously clear in the congressional language nor intended by Congress.[6] The decision thus conflicts with this Court's

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[6] Congress passed Title IV-D of the Social Security Act pursuant to the Spending Clause. *See* U.S. Const. Art. I, § 8, cl. 1; *cf. Helvering v. Davis*, 301 U.S. 619, 640-44 (1937).

decisions holding that conditions imposed upon a State under the Spending Clause are not enforceable under § 1983 unless they are unambiguously clear. *Id.; South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Suter v. Artist M.*, 503 U.S. at 356.[7]

Because Title IV-D imposes upon States an obligation to do no more than substantially comply with federal requirements and imposes upon federal regulators an obligation to ensure substantial compliance, Title IV-D does not "unambigously confer" enforceable rights upon any individual. The court of appeals, however, relied primarily on the regulations in 45 C.F.R., Part 303 to

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[7] Congress recently amended part A of Title XI of the Social Security Act. The amendment states that in all pending and future actions

> brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

42 U.S.C. § 1320a-2. Thus, Congress overturned only the portion of *Suter* that departed from this Court's prior precedent: the portion of *Suter* in which the Court found that the only enforceable right under a statute requiring a state plan is a right to the plan itself. Congress did not attempt to overrule *Suter* to the extent that *Suter* followed *Pennhurst*.

support its finding that Arizona had notice of the requirements for compliance with Title IV-D. The Part 303 regulations, which require compliance "in all cases," contradict the controlling statute, 42 U.S.C. § 602(a)(27), which requires only "substantial" compliance to avoid enforcement action by the Secretary.[8]

Second, creating enforceable rights that are not intended by Congress but are based solely upon regulations gives the Secretary unauthorized power. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.18 (1979) ("[Plaintiffs] also appear to suggest that the rules adopted under § 17(a) [of the Securities Exchange Act of 1934] can themselves provide the source of an implied damages remedy even if § 17(a) itself cannot. . . . It suffices to say, however, that the language of the statute and not the rules must control."); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("rulemaking power granted to an administrative agency charged with the administration of a federal statute" is the power "to carry into effect the will of Congress as expressed by the statute," "not the power to make law") (citations omitted). The majority below, recognizing that the statute itself does not provide an enforceable right or privilege, relied heavily upon the regulations to justify allowing Plaintiffs to sue under § 1983. Rather than strengthening the majority's holding,

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[8] In contrast, Congress intended that the States fully comply with the Medicaid provision at issue in *Wilder*, 496 U.S. 498, which required the State to reimburse medical facilities for providing health care services. Thus, *Wilder* is distinguishable from this case.

however, this approach reveals the weakness of its statutory argument. Indeed, the Ninth Circuit's reliance on the regulations alone to create enforceable rights squarely raises the issue that Justice O'Connor found particularly troubling:

> In the absence of any indication in the language, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities, it is necessary to ask whether administrative regulations *alone* could create such a right. . . . I am concerned . . . that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result. Thus, HUD's frequently changing views on how best to administer the provision of utilities to public housing tenants becomes the focal point for the creation and extinguishment of federal "rights." Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.

Wright v. Roanoke Redev. & Housing Auth., 479 U.S. at 437-38 (1987) (O'Connor, J., dissenting) (emphasis in original).

Third, Congress has no authority to confer standing upon an individual who has suffered no injury in fact from government action and who will obtain no benefit from the judicial relief sought. *See Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992). Thus, in evaluating whether a particular statutory scheme creates "enforceable rights," the Court must carefully examine the particular provisions involved to ensure that Congress intended to create a right or privilege that warrants private enforcement.

Here, Arizona did not cause Plaintiffs' real injury: the failure of the noncustodial parents to acknowledge paternity of or pay child support for their children. *See Linda R. S. v. Richard D.*, 410 U.S. 614, 618 (1973) (affirming dismissal for want of standing: "To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments," but state officials did not cause that injury by failing to enforce child support collection laws); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (federal courts can "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party"). Moreover, Plaintiffs cannot establish that it is " 'likely,' as opposed to merely 'speculative,' that the[ir] injury will be 'redressed by a favorable decision,' " *Lujan*, 504 U.S. at 561 (citing *Simon*, 426 U.S. at 38), because even if Arizona maintained substantial compliance with Title IV-D – the goal that Plaintiffs purportedly seek – a court could only speculate as to whether any particular Plaintiff would then be better off than he or she is now. Judge Kleinfeld noted as much in his dissent in this case:

> [I]f the nominal clients asked their lawyers what was in it for them if they won, their lawyers would have to tell them that win or lose, they could not be assured of any money.

> • • •
>
> Even if the plaintiffs won, and even if the district judge or special master turned out to be a far better administrator of the child support enforcement division than the state . . . , no particular custodial parent could be assured of a dollar more than he or she gets now. A substantially complying child support enforcement unit would still fail to collect from a noncustodial parent who could not be located, or who was dead, unable to pay, or successful in avoiding collection attempts. Most of us who, as attorneys, have attempted collection work for clients have sometimes failed, and few of us have collected 100% of the money due 100% of the time.

App. 43a-44a (Kleinfeld, J., dissenting). Under these circumstances, it is questionable whether Plaintiffs even have Article III standing. At a minimum, the substantial compliance standard and the nature of the services provided under the IV-D program indicate that Congress did not intend to create rights enforceable under § 1983. *See Wilder*, 496 U.S. at 509 (a statute does not create an enforceable right under § 1983 where "the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce") (citations omitted).

Plaintiffs' claims based upon Title IV-D simply cannot support a cause of action under § 1983. In light of the hopeless conflict among the circuits on this issue and the Ninth Circuit opinion's many conflicts with this Court's precedents, the Court should grant certiorari to review the contrary holding below.

3. The Court of Appeals Opinion, Authorizing Over Three Million Custodial Parents to Sue State Officials in Federal Court to Enforce Obligations Under State Child Support Programs That Are Already Subject to Federal Executive Oversight, Will Not Help the Custodial Parents and Will Impair the Programs' Overall Effectiveness – A Result Never Intended by Congress in Enacting Either Title IV-D or the Civil Rights Act.

For reasons outlined above, the issue of whether § 1983 provides a private enforcement mechanism for Title IV-D would be significant enough if the effect of the decision below were restricted to Arizona. What makes the decision staggering is that it opens a floodgate of litigation against state or local officials in nine States. Every dissatisfied custodial parent, the total number of whom could exceed three million,[9] will have the right to file suit claiming that state officials are not doing enough to obtain payments from a noncustodial parent. To be

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[9] The 3,318,107 Title IV-D open case files in Ninth Circuit jurisdictions in 1994 (the most recent data available) were distributed as follows: California (2,135,813); Washington (337,639); Arizona (307,060); Oregon (240,968); Nevada (77,992); Hawaii (65,007); Idaho (54,613); Alaska (50,566); Montana (41,514); Guam (6,935). U.S. Department of Health and Human Services, Child Support Enforcement Nineteenth Annual Report to Congress, 41-49 (1995). In some States, the Title IV-D programs are run by local governments. For example, in California the counties operate the program. In 1994, Los Angeles County alone had over 600,000 cases. California Department of Social Services Information Services Bureau, California Child Support Management Information System Quarterly Report for October-December 1994, Table 1 (1995).

sure, the problem of "dead-beat" parents is a significant one. But it is extremely unlikely that the child support enforcement program in Arizona or any other State will be measurably improved by exponentially increasing the amount of litigation with which the program must contend. The resources drained by and the attention diverted to such litigation can only reduce the effectiveness of the States' methods of enforcing child support obligations.

Indeed, granting the remedy here is likely to injure Plaintiffs. By creating a private right of action to enforce Title IV-D, the court of appeals invests the judiciary with the power to duplicate the enforcement and oversight authority that Congress granted to the Secretary. If Plaintiffs prevail, the federal court probably will appoint a Special Master to monitor the Title IV-D program. This will mean that the State Director, without being able to unilaterally expand the limited resources available, will be required to respond to the Special Master's demands while simultaneously trying to keep the program in substantial compliance with the Secretary's mandates. Every dollar and every minute spent responding to a Special Master's demands is a dollar and a minute not spent delivering services to Plaintiffs. Overlapping judicial oversight will not only further divert limited resources, but may also result in imposing inconsistent obligations upon the State. At best, the requested relief would be a "hurry up" order from the federal court directing the State to "address all the shortcomings the Secretary has already ordered corrected." *Carelli*, 923 F.2d at 1215-16. At worst, it would subject the State Director to contempt liability for trying to satisfy the Secretary's demands

rather than those of the federal court.[10] Thus, the practical effect of the court of appeals opinion is contrary to Title IV-D's purpose, which is to encourage the States to create and operate an efficient and effective child support program.

By creating a private right of action to sue under Title IV-D, the court of appeals opinion transfers power over the Title IV-D program from state and federal executive officials to federal judges. Congress developed an elaborate program of agreements between the Secretary and the States, filled with opportunities for input from program officials and recipients to "calibrate the intensity of the enforcement efforts" through the political process, but the majority opinion essentially guts the program Congress envisioned by displacing it with judicial oversight:

> The district judge, unlike the state legislature, will not be balancing the child support enforcement unit's requests for money against the requests for money of all the other state agencies. Nor will the judge consider taxpayers'

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[10] With two branches of the federal government simultaneously and independently responsible for ensuring that the States comply with federal requirements, the potential for inconsistent rulings by the regulators and the courts is substantial. At a minimum, this dual enforcement scheme will eliminate the ability of the States to know with any confidence what the law actually requires of them. Absent some clear evidence, which does not exist, that this is what Congress intended, the Court should reject this manifestly cumbersome method of implementing Title IV-D.

> preferences for keeping more of their money. The judge's audience will be the legal services lawyers, the assistant state attorneys general, and the judges on our court. That is a different audience, presenting different pressures and incentives, from the elected officials of the state, the federal officials, and the state electorate.

App. 38a (Kleinfeld, J., dissenting). In short, the court of appeals opinion thrusts the judiciary into the day-to-day minutia of administering an elaborate program that Congress already assigned to the Executive Branch to regulate, apparently because the Ninth Circuit panel believes that judges can do a "better job." Yet "Congress established a political process, not a judicial one, to manage this administrative task." *Id.* at 46a. The usurpation authorized by the Ninth Circuit's decision upsets the delicate balance of federalism and separation of powers and denies federal executive branch and state officials the opportunity to take into account other governmental priorities. *See Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (rejecting notion that courts should host suits by individuals challenging government agency program, because this would result in federal judges becoming " 'virtually continuing monitors of the wisdom and soundness of Executive action' ") (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

Courts must give state officials performing their official duties the "widest latitude" possible. *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). The structural injunction and Special Master that Plaintiffs seek to have the court impose in this case would intrude on state sovereignty and would not advance the objective of rectifying any violation of the United States Constitution or laws. *See*

Freeman v. Pitts, 503 U.S. 467, 489-91 (1992). Adherence to the principles of federalism and separation of powers should prevent the judiciary from invading the territory designed and reserved for the other branches and levels of government.

* * *

This case provides the Court with an opportunity to give the lower courts much needed guidance concerning the proper role of § 1983 in promoting nonconstitutional interests. The decision below allows a radical use of § 1983 to usurp state and federal executive branch responsibility for enforcing Title IV-D, a result which Congress could not have intended in enacting Title IV-D. Accordingly, the time has come for this Court to decide whether § 1983 really is just "a platform on which . . . lawyers can stand to have their voices heard in the administrative decisionmaking for the agency, and to collect attorneys' fees," App. 44a (Kleinfeld, J., dissenting), or whether § 1983 instead has the more limited, but fundamental purpose of protecting only those rights that are "unambigously enforceable." Because the decision below squarely poses this issue, the Court should review this case on the merits.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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March 7, 1996

APPENDIX A

Cathy FREESTONE, individually, on behalf of their minor children and on behalf of all others similarly situated; Susan Harrington, individually, on behalf of their minor children and on behalf of all others similarly situated; Sonya Madrid, individually, on behalf of their minor children and on behalf of all others similarly situated; Judith Rogers, individually, on behalf of their minor children and on behalf of others similarly situated; Esperanza Laustaunau, individually, on behalf of their minor children and on behalf of others similarly situated, Plaintiffs-Appellants,

v.

Charles E. COWAN, Director, Arizona Department of Economic Security, in his official capacity, Defendant-Appellee.

No. 93-16697.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 17, 1995.

Decided Oct. 12, 1995.

William E. Morris, Southern Arizona Legal Aid, Inc., Tucson, Arizona, for the plaintiffs-appellants.

Steven J. Silver, Sherry M. Klein, Mirian M. Yim, Assistant Attorneys General, Phoenix, Arizona, for the defendant-appellee.

Appeal from the United States District Court for the District of Arizona.

Before: STEPHEN REINHARDT, THOMPSON and ANDREW J. KLEINFELD, Circuit Judges.

REINHARDT, Circuit Judge:

This case involves a class action brought by custodial parents, primarily mothers, and their children who have been unable to obtain federally required child support enforcement services from the state of Arizona. The class members sued under § 1983 in an attempt to force the state to comply with its federal obligations, under Title IV-D of the Social Security Act, to identify and seek support from "deadbeat dads." The federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D. The district court adopted the reasoning and approach of the Sixth Circuit finding such relief unavailable and granted summary judgment against the plaintiff families. We join the First and Eighth Circuits in holding that § 1983 is available and reverse.

BACKGROUND

As a condition of participating in the federal Aid to Families with Dependent Children (AFDC) program, states are required to adopt a plan for child support enforcement pursuant to Title IV-D of the Social Security Act, and to operate a program in substantial compliance with that plan. 42 U.S.C. § 602(a)(27). The state program must provide a variety of services including establishment of paternity, enforcement of support orders, and parent locator services. The state must provide these enforcement services both to families receiving AFDC and to non-AFDC families that request them. AFDC families must assign their rights to monetary child support to

the state; however, the first fifty dollars of any support collected each month is "passed through" to the AFDC family. All money collected on behalf of non-AFDC families is passed on entirely to the family. A large portion of the costs associated with administering a state's Title IV-D program is reimbursed by the federal government.[1]

The Secretary of Health and Human Services is responsible for monitoring state compliance with Title IV-D through periodic audits, and may impose penalties in the form of a reduction in AFDC money for noncompliance, ranging from one to five percent. From 1985 until 1991, Arizona failed three audits conducted by the Department of Health and Human Services (HHS). After the first failed audit, Arizona devised a Corrective Action Plan (CAP) which was approved by the Secretary.[2] However, subsequent audits showed that this CAP was not successfully implemented. After the final failed audit,

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[1] The reimbursement rate ranges from 66-90%. General operating expenses are reimbursed on the following scale: 70% for fiscal years 1984-87, 68% for fiscal years 1988-89, and 66% for fiscal year 1990 and each following fiscal year. See 42 U.S.C. § 655(a)(2). Prior to fiscal year 1984, states were reimbursed at a rate of 75%. State expenditures related to an automatic data processing and information retrieval system or related to laboratory costs incurred in establishing paternity are reimbursed at a rate of 90%. See 42 U.S.C. § 655(a)(1). The Secretary has promulgated regulations for determining exactly which state expenditures are reimbursable. See 45 C.F.R. § 304.20.

[2] A corrective action plan sets forth the steps necessary to achieve substantial compliance with the Title IV-D requirements. See 45 C.F.R. § 305.99. Even though the Secretary approves a CAP, this is no guarantee that the state will be found in substantial compliance in subsequent audits.

Arizona devised a new CAP. The Secretary approved the 1992 CAP and waived the 1% penalty. At the time the complaint was filed, the CAP was scheduled to expire on March 1, 1993. During this most recent CAP period, Arizona's State Auditor General conducted an internal performance audit of the child support enforcement program and declared it "barely functioning."[3]

Appellants are a class of Arizona custodial parents of minor children who qualify for enforcement services under Title IV-D. The class includes both AFDC and non-AFDC families. The five named plaintiffs in this action are Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers and Esperanza Laustaunau. The custodial parents assert that Arizona's child support enforcement administration systematically fails to furnish them with the services mandated by federal law. The original complaint and the appellant's brief recites a litany of abuses to which the named plaintiffs have been subject. The stories told by the five named plaintiffs document a range of administrative abuses extending from simple incompetence and bureaucratic bungling to shockingly callous

[3] The internal audit documented a host of problems in the Arizona program. Among other deficiencies, the auditor noted that regular support payments were received in only 3% of the approximately 275,000 cases assigned to DCSE, and only 25% of these cases even have a valid support order established. Because of the widespread system problems, as of 1992, Arizona's Title IV-D program had failed to collect hundreds of millions of dollars in delinquent child support payments.

indifference.[4] The most fortunate of the named plaintiffs appears to be Cathy Freestone.

After their divorce, Cathy Freestone's former husband failed to meet his monthly child support obligations. Freestone could not afford private counsel so she turned to Arizona's Department of Child Support Enforcement (DCSE) for collection assistance. Freestone completed the necessary forms to obtain a wage assignment from her ex-husband's employer. A month later, she called DCSE and was told that the case agent was still waiting for information from a section of the Phoenix office. It was only after Freestone volunteered to procure the information herself and submitted it to her case agent that any progress began to take place. Eventually the wage assignment order was filed, but Freestone discovered that during the interim her ex-husband had switched to a higher paying job for a different employer. She then urged DCSE to obtain a valid wage assignment against the new employer and to obtain a modification of the divorce decree for increased child support payments. Once again, DCSE failed to act in a timely manner. Freestone's ex-husband again switched jobs, this time moving to a lower-paying job in an attempt to avoid increased child support obligations. Although DCSE eventually obtained a wage assignment order against his most recent employer, payments have remained sporadic and DCSE has failed to provide periodic notice to Freestone or to explain the continuing irregularities.

[4] These stories are outlined in detail in the plaintiffs' original complaint. Because of the posture of this case, we accept all of the alleged facts as true.

Compared to the other named plaintiffs, Freestone's frustrating experiences appear to have been relatively mild. Susan Harrington has obtained, at most, meager assistance from DCSE. Harrington has cooperated with DCSE and its predecessor since 1980 in an effort to force her ex-husband to comply with his support obligations for their three minor children. DCSE has repeatedly lost Harrington's case file and only attempts to contact Harrington's ex-husband when she personally tracks him down and provides the agency with his current address and employment information. Often times, when Harrington has managed to find her ex-husband (who at all times resided and worked in Arizona) and inform DCSE of his whereabouts, because of its extraordinarily long delays in taking enforcement action, he successfully relocates and escapes the agency's grasp. In 13 years, DCSE has managed to obtain only two monthly support payments for Harrington.

At the farthest end of the spectrum, are the plaintiffs who simply have received no help at all. For example, Sonya Madrid is an AFDC mother of four who has consistently provided DCSE with all the required information and has repeatedly given the agency her nomadic ex-husband's address. Although Madrid believes that over the past 10 years DCSE has obtained some support payments from her ex-husband, she has *never* received a pass-through payment.

Similarly, Judith Rogers unsuccessfully sought paternity establishment assistance from DCSE. Although her child's father has acknowledged paternity and his name appears on her son's birth certificate, Rogers needs a formal declaration of paternity in order to establish a

valid child support order. Also, if paternity were legally established, her son would be entitled to payments against his father's social security account. Rogers first applied for DCSE services in 1980. Although the father's whereabouts are known, the agency has failed to establish paternity over a thirteen-year period. Rather, it has managed to lose Rogers' file on multiple occasions, forcing her to reapply for services each time. At the time this action was filed, Rogers' son was a few months away from reaching majority.

Because of systematic failures including the failure to procure wage assignment when all information as to the former spouse's current employer and address has been provided by the custodial parent, the failure to disburse collected support payments in a timely manner or to sufficiently account for payments collected, the frequent losses of clients' files thus forcing them repeatedly to reinitiate enforcement procedures and to complete voluminous forms and burdensome paperwork over and over again, and the inexplicable failure to account for or disburse "pass-through" payments, the parents filed this § 1983 action. They seek equitable relief including a declaratory judgment that the current operation of the Arizona Title IV-D program violates federal law, and a permanent injunction enjoining the state from engaging in this pattern and practice of noncompliance and requiring affirmative measures to achieve and maintain substantial compliance with federal law.

Defendant Cowan, Director of Arizona Department of Economic Security, filed a motion to dismiss premised on two grounds: 1) a Rule 12(b)(1) dismissal for lack of standing and thus a lack of subject matter jurisdiction; 2)

a Rule 12(b)(6) dismissal for failure to state a claim on which relief can be granted. The state attached various exhibits to its motion, including its most recent CAP. Because of the attachments and exhibits, the district court treated the motion as one for summary judgment. The Director raised numerous arguments in support of his motion, only three of which the district court analyzed and ruled on: He argued that the recipients of Title IV-D services are not the intended beneficiaries of the Act; that there are no mandatory requirements upon the state giving rise to enforceable rights under § 1983; and that under the Sixth Circuit *Carelli* rationale, the Title IV-D auditing scheme precludes an action under § 1983.

Rejecting the first two arguments, the district court found, first, that persons in plaintiffs' position are the intended beneficiaries under Title IV-D; and, second, that although there is no clear requirement that every applicant receive prompt Title IV-D services, plaintiffs are entitled to bring the action if the remedy they request increases their chances of receiving the services.

Although the district court found that the plaintiffs had rights under Title IV-D that were enforceable in a § 1983 action, it nonetheless granted summary judgment for the defendant. It relied on the Sixth Circuit's *Carelli* decision which held that Congress had foreclosed relief under § 1983 by adopting a federal auditing system for the child support enforcement program.[5] The court also agreed with *Carelli* that its ruling was similar to an abstention order. We review de novo and reverse.

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[5] *See Carelli v. Howser*, 923 F.2d 1208 (6th Cir.1991).

ANALYSIS

The parties dispute the proper characterization of the district court's order. The plaintiffs primarily argue that the district court issued an unauthorized abstention order. They argue that the district court's act of "quasi-abstention" runs contrary to Ninth Circuit and Supreme Court authority.[6] Plaintiffs base their characterization of the order on an analogy invoked by *Carelli* and reiterated by the district court. Although the district court analogized its disposition of the case to an abstention order, it is clear that the basis of its holding was its conclusion that Title IV-D contained a "comprehensive remedial scheme." We read the district court's order as ultimately turning on the question whether a § 1983 action is available to enforce Title IV-D. We now address that question.

I. Availability of a § 1983 Action

It is well settled that § 1983 provides a private cause of action for violations of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). There are two exceptions to this rule. First, a § 1983 action is unavailable if the statute does not create enforceable rights. In other words, the statutory provision at issue must be intended to benefit the plaintiff. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990). Second, a § 1983 action is unavailable

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[6] Plaintiffs also argue that HHS oversight does not evidence congressional intent to foreclose a § 1983 action; that the district court's failure to grant *any* relief violates ordinary principles of equity jurisdiction; and that *Carelli* is factually inapposite to their case.

if Congress has foreclosed enforcement of the statute in the enactment itself. *Id.* at 509, 110 S.Ct. at 2517. Generally, this means either that the Act expressly precludes a § 1983 remedy in its provisions, or that the statute creates a remedial scheme that is sufficiently comprehensive to demonstrate congressional intent to preclude a § 1983 remedy. *Id.* at 520, 110 S.Ct. at 2523.

Currently, there is a three-way split of authority as to the availability of a § 1983 action to enforce Title IV-D. This circuit has not previously addressed the question.[7] A few courts have concluded that Title IV-D creates no enforceable rights. *See Wehunt v. Ledbetter,* 875 F.2d 1558 (11th Cir.1989); *Mason v. Bradley,* 789 F.Supp. 273 (N.D.Ill.1992); *Oliphant v. Bradley,* 1992 WL 153637 (N.D.Ill. Feb. 20, 1992) (not reported in F.Supp.). An impressive majority of courts has found that it does. *See Carelli v. Howser,* 923 F.2d 1208 (6th Cir.1991); *Howe v. Ellenbecker,* 8 F.3d 1258 (8th Cir.1993); *Albiston v. Maine Commissioner of Human Services,* 7 F.3d 258 (1st Cir.1993);

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[7] There have been two Ninth Circuit cases involving private suits and Title IV-D. *Barnes v. Healy,* 980 F.2d 572 (9th Cir.1992) involved custodial parents challenging California's child support enforcement program. However, that class action involved procedural due process claims, and the issue of enforceable statutory rights was not addressed.

Vanscoter v. Thompson, 920 F.2d 1441 (9th Cir.1990) involved a class action brought by AFDC recipients challenging federal regulations and state practice relating to notice and disbursement of "pass-through" payments. The court never stated whether the suit was brought under the APA, § 1983, or directly under Title IV-D. At least one of the plaintiffs' claims was based on due process grounds. *Id.* at 1450. In any case, the issues discussed here were neither raised nor addressed.

Monzon v. Martinez, 833 F.Supp. 479 (E.D.Pa.1993); *King v. Bradley,* 829 F.Supp. 989 (N.D.Ill.1993); *Behunin v. Jefferson County Dep't of Social Services,* 744 F.Supp. 255 (D.Colo.1990). Of the courts that have found enforceable rights under Title IV-D, apparently only one (other than the district court below) has held that a comprehensive enforcement scheme nonetheless precludes a § 1983 action. *See Carelli,* 923 F.2d 1208. The remaining courts have found that neither of the two general exceptions to § 1983 availability is applicable to Title IV-D. *See Howe v. Ellenbecker,* 8 F.3d 1258 (8th Cir.1993); *Albiston v. Maine Commissioner of Human Services,* 7 F.3d 258 (1st Cir.1993); *King v. Bradley,* 829 F.Supp. 989; *Behunin v. Jefferson,* 744 F.Supp. 255. We conclude that this latter group of cases represents the better view, and hold that § 1983 is available for enforcement of Title IV-D.

A. Enforceable Rights

1.

In *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), the Court set forth a three-factor test for analyzing whether a particular statute establishes "enforceable rights" which can be vindicated in a private action under § 1983. The question presented in *Wilder* was whether the Boren Amendment to the Medicaid Act requiring states to reimburse health care providers according to "reasonable and adequate" rates created enforceable rights under § 1983.

The Court explained that the "enforceable right" inquiry turns on whether the plaintiff is one of the intended beneficiaries of the statute, whether the statute

imposes a binding obligation on the state, and whether the plaintiffs' asserted interest is so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce." *Id.* at 509, 110 S.Ct. at 2517 (internal citations and quotations omitted).[8] The Court applied this analysis to determine that the Boren Amendment created enforceable rights in health care providers. *See also Howard v. City of Burlingame*, 937 F.2d 1376, 1378 (9th Cir.1991).

Subsequent to the Court's decision in *Wilder*, the Court revisited the topic of the meaning of "enforceable rights" in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992). The Court's discussion in *Suter* is somewhat less hospitable to the concept of enforceable rights than prior cases, and some question exists as to whether the analysis in *Suter* alters the test set forth in *Wilder*. *See Suter*, 503 U.S. at 365, 112 S.Ct. at 1371 (Blackmun, J., dissenting). *See also Albiston*, 7 F.3d at 262 (noting argument that *Suter* appears to depart from *Wilder*); *King*, 829 F.Supp. at 992 n. 1 (*Suter* "casts some doubt on whether the *Wilder* framework was still valid") (collecting cases).

Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), involves a § 1983 class action brought on

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[8] The Court was careful to note that an analysis of whether a statute is enforceable under § 1983 and whether it is enforceable through an *implied* right of action are two separate and distinct inquiries. 496 U.S. at 508 n. 9, 110 S.Ct. at 2517 n. 9. The inquiry into whether an *implied* right of action exists is governed by the four-factor *Cort v. Ash test*. As the Court's discussion shows, it is generally more difficult to establish an implied right of action than it is to establish the availability of a § 1983 action.

behalf of child beneficiaries of the Adoption Assistance and Child Welfare Act of 1980. The Act requires states to adopt plans regarding foster care and adoption services that, *inter alia*, ensure that "reasonable efforts will be made" to prevent removal of children from their homes and to facilitate the re-unification of families. 503 U.S. at 351-52, 112 S.Ct. at 1364. One of the central issues in *Suter* was whether the "reasonable efforts" clause of the Adoption Act can be enforced in a § 1983 action.

The Court concluded that the "reasonable efforts" clause does not confer enforceable rights upon the Act's beneficiaries. The Court reasoned that when "reasonable efforts" is read in context, the clause does not itself create binding obligations on the state because no further statutory guidance can be found as to measuring what constitutes "reasonable efforts." *Id.* at 359, 112 S.Ct. at 1368. The Court also noted that the regulations promulgated under the Act are not specific and do not provide notice to states that a failure to do anything other than submit a plan with stipulated features for Secretary approval is a condition to receive funding. *Id.* at 361, 112 S.Ct. at 1369. Thus, the Court concluded that "reasonable efforts" simply imposes a "generalized duty on the State, to be enforced not by private individuals, but by the Secretary. . . . " *Id.* at 363, 112 S.Ct. at 1370.

The Court did not explain the impact of its *Suter* analysis on the *Wilder* test. Subsequent courts have taken a variety of approaches towards reconciling *Suter* and *Wilder*. *Compare Albiston*, 7 F.3d at 262-64 (making *Suter* a threshold inquiry) *with Howe*, 8 F.3d at 1262-63 (synthesizing two cases into a semi-coherent whole). We conclude that *Suter* represents an elaboration and amplification of

the *Wilder* test rather than an unannounced and unacknowledged departure. It is notable that the *Suter* majority both cited and relied on *Wilder*. While the *Suter* dissent proclaimed the majority's opinion a departure from and a failure to apply precedent, the majority neither acknowledged nor addressed the dissent's argument. We can not conclude that the Court would overrule *sub silentio* a precedent of such recent vintage. *Wilder* and *Suter* are separated by a mere two years. Because the *Suter* majority's silence in the face of the dissent's accusation strongly suggests that the majority believed that it was not overriding precedent but instead was merely applying settled legal principles, we must conclude that that is exactly what it did. Accordingly, we read *Suter* as the Court's effort to provide additional guidance on what is a "binding obligation" and when an asserted interest may be deemed "judicially enforceable."

2.

As almost every court to consider the issue has concluded, we hold that Title IV-D clearly meets the three *Wilder* requirements as amplified in *Suter*. First, the statutory and regulatory scheme creates binding obligations upon the state. In order to receive AFDC funding, a state must operate a Title IV-D program. Specifically, the state must have an approved plan for child and spousal support and must operate a child support program "in substantial compliance with such plan." 42 U.S.C. § 602(a)(27). At first blush, one might assume that the phrase "substantial compliance" is no more concrete and unambiguous than the "reasonable efforts" phrase found problematic in *Suter*. However, unlike "reasonable

efforts" in the program at issue in *Suter*, "substantial compliance" does not stand alone. The statute and regulations under Title IV-D provide highly detailed requirements imposing specific duties on the states.

The Title IV-D scheme stands in sharp contrast to that in *Suter*. In *Suter*, the Court determined that the only affirmative obligation placed on the states by the Act was a requirement that a state have a plan approved by the Secretary containing a list of certain features. 503 U.S. at 357, 112 S.Ct. at 1367. The Court then examined the regulations promulgated under the statute and determined that they imposed no additional obligations. Central to the Court's determination was the observation that the relevant regulations were "not specific, and do not provide notice to the states that failure to do anything other than submit a plan with the requisite features . . . is a further condition on the receipt of funds . . . " 503 U.S. at 361, 112 S.Ct. at 1369.

The same is not true with regard to Title IV-D. Both the statute and regulations establish clear requirements upon the state regarding the administration of a Title IV-D program. For example, 42 U.S.C. § 654 sets out at length the specific provisions which must be included in a state plan for child and spousal support. A small sampling of these mandatory provisions include: a requirement that the state will establish the paternity of children born out-of-wedlock to AFDC recipients [§ 654(4)(A)]; provide periodic notice to families of the amount of support collected on their behalf based on a specified schedule ranging from a monthly to a quarterly basis [§ 654(5)]; establish a service meeting designated requirements to locate absent parents [§ 654(8)]; provide that the state will

adhere to the administrative regulations established to ensure an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments [§ 654(13)]; provide that the state establish procedures for procuring delinquent child support payments from tax refunds [§ 654(18)]; provide that the state regularly and frequently publicize the availability of child support enforcement services [§ 654(23)].

But more than identifying specific provisions to be included in a state plan for its child support enforcement program, the statute also sets forth explicit administrative procedures that a state must establish and implement to ensure the effectiveness of its program. See 42 U.S.C. § 666. A small sample of these include procedures for garnishment of wages, garnishment of state tax refunds, imposition of liens against real and personal property for delinquent support, and for establishing a series of presumptions and requirements related to genetic testing for paternity determinations.

Finally, the statute also sets forth detailed criteria for measuring compliance with the statute. For example, 42 U.S.C. § 652(g) establishes performance standards for state paternity establishment programs. The baseline performance standard established in 75%, and the statute sets out a formula for calculating this percentage based on the total number of out of wedlock births during a fiscal year.

Although the Title IV-D statute itself is highly detailed, the regulations promulgated under the statute provide even more specificity. In 45 C.F.R. § 303, the

Secretary has set forth very specific and detailed regulations regarding standards for individual states' Title IV-D program operation. For example, the regulations lay out a step-by-step process to be followed when attempting to locate absent parents and their income or assets. See 45 C.F.R. § 303.3. These steps include examining all appropriate location sources within 75 calendar days of determining location is needed,[9] referring appropriate cases to the Title IV-D agencies of other states, and repeating location attempts quarterly or immediately upon receipt of new information.

The regulations also set forth highly detailed and specific procedures (including time limits, methods, and resources to use) regarding the establishment of support obligations, establishment of paternity, enforcement of support obligations, provision of services in interstate IV-D cases, review and adjustment of child support orders, and case closure criteria. Reading both the statute and the regulations, states have a clear indication of the terms of the bargain they are entering into when they agree to accept AFDC funds.

In sum, it is not simply the use of the phrase "substantial compliance" that creates enforceable rights. Our conclusion that the right is enforceable results in large

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[9] Section 303.3(b)(1) identifies "appropriate location sources." These include the Federal Parent Locator Service, officials administering various public assistance and social welfare programs, relatives and friends of absent parent, the local telephone company, U.S. postal service, unions, fraternal organizations, police records, parole records, probation records, various state departments handling income taxation, driver's licenses, and vehicle registration.

measure from the fact that the state is required to provide specified services which meet a specified quantitative standard. The statute and the regulations set out in explicit detail the type of services to be rendered and the standards by which those services will be measured. "Substantial compliance" is simply a short hand way of setting forth a standard that the state must meet. The state can meet this standard only by satisfying the concrete requirements which are specified in the statutory and regulatory scheme.

Second, plaintiffs' asserted interest is not vague or amorphous, and it is sufficiently concrete to be judicially enforceable. The provision of specified services in compliance with a defined plan gives rise to a judicially enforceable interest. The statutes and regulations clearly set out what services are to be provided and by what standards a program is to be evaluated. The core services mandated by federal law are paternity location, paternity establishment, establishment of child support orders, and child support collection. Whether a state's program provides those services and whether plaintiffs are receiving to those services to the degree required by law is judicially ascertainable.

Finally, the statutory language and legislative history show that Title IV-D is intended to benefit needy families with children.[10] *See Howe*, 8 F.3d at 1262. As the *Howe*

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[10] Notably, the standard for intended beneficiary under § 1983 is somewhat broader than that under an implied right of action. For purposes of an implied right of action, the plaintiff must demonstrate that he is a member of a class for whose "*especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). This means that protection of the plaintiff's class must have been the *primary* concern of the legislation rather than a secondary or ancillary consideration. *Id.* at 80, 95 S.Ct. at 2089-90. In contrast, for purposes of § 1983, multiple statutory beneficiary classes may exist and plaintiff's group need only fit in one of those beneficiary classes. *Cf. Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (NLRA creates several classes of federal rights enforceable in § 1983 action). *See also Carelli*, 923 F.2d at 1211 (noting that a statute may have more than one class of beneficiaries and this does not preclude § 1983 enforcement).

There are more stringent requirements for implied rights of action because judicially constructed implied rights of action raise separation of powers concerns not implicated by § 1983. *See Wilder*, 496 U.S. at 508 n. 9, 110 S.Ct. at 2517 n. 9. Congress controls the availability of remedies for violations of statutes, and § 1983 provides an express congressional authorization of private actions. *Id.*

court noted, the first section of Title IV-D sets out several purposes for the enactment including: "enforcing the support obligations owed by absent parents . . . and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for [AFDC]) for whom such assistance is requested. . . . " 42 U.S.C. § 651. The relevant congressional committee report states:

> The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but,

> more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S.Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8146. Although the same report makes note of the financial benefits that would accrue to the government if more absent parents supported their children, Congress realized that one of the more important interests vindicated by this Act was the rights of children:

> The Committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner unless identification of the father is clearly against the best interests of the child. Although this may in some cases conflict with what a social worker considers the mothers' short-term interests, the Committee feels that the child's right to support, inheritance, and to know who his father is deserves the higher social priority.

Id. at 8154-55.

Thus, we agree with the overwhelming weight of authority recognizing that Title IV-D was intended to benefit needy families, and particularly children. *See Howe*, 8 F.3d at 1262 (collecting cases).

3.

Although we find it quite clear that Title IV-D creates enforceable rights in families in need of Title IV-D services, there is some question as to the contours of those

rights. The state argues that the most plaintiffs are entitled to is "substantial compliance." Under this reasoning, so long as the state meets the 75% requirement, no plaintiffs may sue, even if they fall within the 25% of cases not being serviced. *See King*, 829 F.Supp. at 994.

In contrast, the plaintiffs contend that the 75% simply establishes the minimum requirement for funding without penalty, but that in some areas, at least, 100% compliance is mandatory. They further argue that § 303 of the regulations sets forth the efforts that must be taken in each and every case. In support of their arguments, plaintiffs primarily rely on *Withrow v. Concannon*, 942 F.2d 1385 (9th Cir.1991).

In *Withrow*, a class comprised of applicants for and recipients of AFDC, Food stamps, and Medicaid sued Oregon officials seeking declaratory and injunctive relief compelling the defendants to hold hearings in compliance with federally prescribed time limits. The district court granted summary judgment in favor of the state officials on the ground that they had substantially complied with the applicable federal regulations. We reversed, reasoning that "substantial compliance" was simply a standard for termination of federal funding and was not an appropriate standard for defining the rights of the relevant beneficiaries. 942 F.2d at 1387. We explained that the funding standard was not a measure of what the regulations require but rather a measure of when a failure to meet those regulations had reached sufficient magnitude to trigger a funding cessation. *Id.* In order to determine precisely what the regulations required, we

reasoned, one must look to the language of the regulations themselves. We pointed to the unequivocal language of the regulations that imposed mandatory requirements and stated:

> From the standpoint of the applicants or recipients who are denied hearings and decisions within the time mandated by federal regulations, it is not comfort to be told that there is no federal remedy because the state is in "substantial compliance" with federal requirements.

Id. at 1387.

Plaintiffs argue that the § 303 regulations promulgated under Title IV-D are analogous to the regulations in *Withrow* and that *Withrow* is controlling. They point out that the regulatory language is equally mandatory and unequivocal in both cases. Defendants attempt to distinguish *Withrow* on the basis that *Withrow* involved basic subsistence rights not at issue here. We do not agree that *Withrow* can be so easily distinguished, but we need not decide that point here. The question whether federal law precludes an individual remedy during periods in which the state is in "substantial compliance," although an interesting one, is not before us. The district court made no factual findings as to the level of Arizona's compliance but rather disposed of this case on the legal ground that a § 1983 action is generally unavailable in Title IV-D cases. It is only the latter proposition that we consider here. Accordingly, the state's representations at oral argument regarding the improvements in certain core functions of its program are simply irrelevant to the issue before us.

B. Congressional Foreclosure of Enforcement

The district court based its conclusion that Title IV-D contains a remedial scheme sufficiently comprehensive as to foreclose a § 1983 remedy on the Sixth Circuit's decision in *Carelli*.[11] *Carelli*, like the present case, involved a class of custodial parents who sued the responsible state officials for injunctive relief in a § 1983 action challenging their administration of the state's child support enforcement services. On interlocutory appeal from the district court's denial of their motion to dismiss, the state officials made two arguments: first, that the plaintiffs were not the intended statutory beneficiaries; and second, that Congress had foreclosed private enforcement through the enactment of a comprehensive auditing scheme.

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[11] The district court's reading of *Carelli* is not the only possible one. A reasonable alternative reading of the case is that a § 1983 action is not precluded in *every* Title IV-D case, but rather that on the facts presented there, the action should not be allowed to proceed. A later Sixth Circuit decision has construed *Carelli* as barring the action because "the *Carelli* plaintiffs, in particular, failed to state a cognizable claim because they made 'no attack on the applicable regulations,' and alleged 'no acts of non-compliance beyond those already unearthed' by the Secretary." *Wood v. Tompkins*, 33 F.3d 600, 612 n. 23 (6th Cir.1994).

As the plaintiffs point out, such a basis for barring the claim comes dangerously close to an unauthorized and perhaps inappropriate species of abstention. However, we need not explore the full ramifications of such a construction of *Carelli* because it is clear that the district court *here* relied on a construction of *Carelli* that focused on the comprehensive enforcement scheme. See Order at 4,7. This was also the construction offered by the State at oral argument.

The *Carelli* court rejected the first argument because the legislative history showed that one of the classes of intended beneficiaries was needy families with children. 923 F.2d at 1211. However, it ruled for the defendants on the second argument holding that the statute contained a comprehensive remedial scheme foreclosing a § 1983 action. In reaching this conclusion, the court pointed to the audit provisions and detailed performance criteria, and the fact that the statute and regulations had been amended several times, thus demonstrating "fine tuning." Because the state had failed two audits, been subject to a penalty, and was implementing a new Corrective Action Plan, the court characterized plaintiffs' action as an attempt to seek a " 'hurry-up' order from the federal court." *Id.* at 1215. The court concluded that it was unconvinced that "congress intended the federal judiciary to occupy the same ground at the same time and in the same manner as the secretary. . . . " *Id.* at 1216. The court also noted that the plaintiffs could each seek individual relief through private suits to enforce support orders and establish paternity.

Unlike all the other courts that have considered the comprehensive enforcement scheme argument, the district court in the case now before us agreed with and adopted the *Carelli* court's rationale. However, an examination of the cases in which the Supreme Court has discussed the issue shows that the Title IV-D audit and penalty scheme fall far short of the "sufficiently comprehensive" requirement.

Middlesex County Sewerage Authority v. National Sea Clammers, Ass'n, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), established the "sufficiently comprehensive"

exception to § 1983 actions. In *Sea Clammers*, the Court found that the Federal Water Pollution Control Act (FWPCA) contained such an exhaustively comprehensive enforcement scheme that congress necessarily must have intended to foreclose a § 1983 cause of action. 453 U.S. at 13-14, 101 S.Ct. at 2623. The scheme consisted of elaborate enforcement provisions including authorization for governmental bodies to seek civil and criminal penalties, the right of any interested person to seek judicial review of agency action, and two separate citizen suit provisions.

Since *Sea Clammers* was decided, few statutes have been found to contain such a preclusive enforcement scheme, and the exception is viewed as a narrow one. The Court has often warned that it "will not lightly conclude that congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24, 107 S.Ct. at 770. In fact, in only two cases has the Supreme Court found such a comprehensive scheme to exist. The first was *Sea Clammers* itself, and the second was *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). A central feature of both of these statutory schemes was the inclusion of express *private* remedies allowing citizens to compel state action. Title IV-D contains nothing akin to a separate private remedy.

Most pertinent to the present case, a remedial scheme that closely tracks the Title IV-D scheme has previously been deemed insufficiently comprehensive to foreclose § 1983 action. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), tenants living in low-income housing projects owned by the city housing authority brought a § 1983 suit

alleging that the authority overbilled them for their utilities in violation of the rent ceiling imposed by the Brooke Amendment to the Housing Act. The Court reversed the court of appeals decision that the administrative scheme providing for enforcement by HUD foreclosed private enforcement. The Court found that agency's power to audit, enforce contracts, and cut off federal funds constituted "generalized powers" insufficient to foreclose § 1983 remedies. 479 U.S. at 428-30, 107 S.Ct. at 773.

The sufficiency of audits and fiscal penalties as a remedial scheme could not have been more clearly rejected. Specifically, the Court stated: "Neither, in our view, are the remedial mechanisms provided sufficiently *comprehensive and effective* to raise a clear inference that congress intended to foreclose a § 1983 cause of action. . . . " 479 U.S. at 425, 107 S.Ct. at 771 (emphasis added). *See also Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 1222, 25 L.Ed.2d 442 (1970) (rejecting argument that a federal court is without power to review state plan because the Department of Health, Education and Welfare (HEW) had power to cut off federal funds for noncompliance with statutory requirements; Court reasoned "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program").

The reasoning in *Carelli* is completely inconsistent with that in *Wright*, and *Carelli* did not attempt to distinguish the Supreme Court's discussion in that case. The Secretary here has no more power than HUD possessed in *Wright*. All HHS can do is audit and reduce AFDC funding. Moreover, the *Wright* Court explicitly rejected

the argument subsequently adopted by *Carelli* that plaintiffs have other state court remedies. The *Wright* Court reasoned that "the state-court remedy is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights." 479 U.S. at 429, 107 S.Ct. at 773.

In addition to this compelling and binding Supreme Court authority, an examination of Ninth Circuit cases where a remedial scheme was found to be sufficiently comprehensive shows that the Title IV-D scheme is meager by comparison.

In *Almond Hill School v. USDA*, 768 F.2d 1030 (9th Cir.1985), the plaintiffs sought an injunction to halt pesticide spraying in their area under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Plaintiffs claimed that the pesticide project violated labeling provisions of FIFRA.

In finding that the enforcement scheme of FIFRA was sufficiently comprehensive, the court pointed to: the administrative and judicial enforcement procedures; administrative power to impose civil penalties against violators; criminal sanctions for intentional violations; express authorization to EPA Administrator and Attorney General to seek injunctive relief; an elaborate administrative review procedure and express provision for review of agency decision in district court or court of appeals; and procedures by which interested persons can file complaints with the Administrator to challenge particular use of pesticide. *See* 768 F.2d at 1035-38.

When compared to the factors identified in *Almond Hill*, the Title IV-D enforcement scheme is paltry indeed.

Although the statutes and regulations set forth highly detailed performance and audit criteria that states must comply with in order to "substantially comply" with federal law, the remedies for failure to "substantially comply" are neither similarly detailed nor specific. If a state fails to substantially comply, it is subject to increased monitoring. Rather than the statutorily prescribed three year audit, the state must be audited annually. If the state repeatedly fails the audits, the Secretary may reduce AFDC funding. This penalty ranges from one to five percent depending on the duration of noncompliance. There are no other provisions for administrative enforcement.

Moreover, there are no provisions for judicial enforcement. This complete lack of judicial enforcement strongly supports the conclusion that the Title IV-D enforcement scheme falls short of what is required to foreclose a § 1983 action. In *Keaukaha-Panaewa Community v. Hawaiian Homes*, 739 F.2d 1467 (9th Cir.1984), we noted that the Hawaiian Admissions Act provisions provided no private administrative or judicial remedies, but simply gave the federal government the right to sue. We concluded that this single *public* remedy could not foreclose a private § 1983 remedy. 739 F.2d at 1471. *See also Wright*, 479 U.S. at 426-27, 107 S.Ct. at 772 (noting that provisions for private judicial remedies evidence congressional intent to supplant a § 1983 remedy). If the presence of a public judicial remedy without a corresponding private remedy is insufficient to make an enforcement scheme "sufficiently comprehensive," then it would seem clear that a bar does not arise when the statute contains *no* judicial enforcement provision at all.

Under *Almond Hill*, it is also necessary to consider whether a § 1983 remedy would be inconsistent with the statutory remedies. Private enforcement here would not undermine existing statutory mechanisms because the HHS auditing scheme would not be interrupted. In fact, private enforcement may actually enhance effectiveness of the reduction penalty by giving states a greater incentive to comply with federal law. Unlike a small monetary penalty that decreases the amount of funds available for AFDC recipients, the contempt power of the court, as well as other traditional equitable remedies, is likely to be more successful in inducing compliance on the part of state officials, and where necessary, state legislators. Thus, the availability of private actions supplements the investigatory and enforcement power of HHS.

Our conclusion is the same as that reached by the First and Eighth Circuits. Both *Howe* and *Albiston* were decided after the district court issued its order here and both courts soundly rejected the rationale invoked in *Carelli*.

In *Howe v. Ellenbecker*, 8 F.3d 1258, 1263 (8th Cir.1993), the court reasoned that "Title IV-D does contain an enforcement scheme in the form of fiscal sanctions the federal government may assert against the state, but these remedial measures are neither comprehensive nor available to the class. The federal government's authority to audit and impose monetary sanctions does not constitute 'comprehensive' remedies." *Id*. The *Howe* court relied directly on *Wright* for its conclusion.

Albiston involved a class of AFDC recipients who brought a § 1983 action to compel the timely disbursement of pass-through and gap payments as required by Title IV-D and Title IV-A regulations.[12] The *Albiston* court expressly rejected the *Carelli* conclusion that the administrative enforcement scheme precludes § 1983 private actions. The court noted that "the Supreme Court repeatedly has held that administrative enforcement schemes must be presumed to *parallel* the private § 1983 enforcement remedy, rather than to 'occupy the same ground' as the state contends." 7 F.3d at 269 (original emphasis).

The *Albiston* court invoked a rationale similar to this court's earlier reasoning in *Withrow*. Indeed, the court specifically cited *Withrow* noting:

> In our view, the OCSE administrative enforcement scheme, authorizing penalties against participating states for "substantial noncompliance," seems intended to protect important *federal* interests, including prompt disbursement of federal funds to needy AFDC recipients as mandated by Congress, by ensuring that *overall* performance by the participating State does not fall below federally-prescribed levels. The private remedy afforded by § 1983, on the other hand, safeguards the *individual*

[12] Pass-through payments are regulated under Title IV-D. Gap payments are the difference between a family's predetermined level of need and the amount received from the state in AFDC. Under Title IV-A regulations, a state is required to fill this "gap" with money it collects through its Title IV-D program.

> *AFDC recipient's interests* in the timely receipt of the mandated federal benefits.

7 F.3d at 269 (original emphasis).

Again, the state argues that such a rationale is somehow distinguishable from the present case because *Albiston* involved important property interests not at stake here. We reject this distinction. First, it is factually incorrect. The plaintiff class here sets forth a plethora of alleged violations. The allegations include the failure to disburse pass-through payments and the mishandling of support payments collected on behalf of non-AFDC recipients. These allegations implicate concrete property rights.

Second, the other "non-property" interests implicated by the class allegations are no less important or deserving of legal protection. Congress has seen fit to deem these individual interests worthy of federal protection, and we are not in a position to second-guess this congressional judgment. Section 1983 protects *statutory* rights. Although some statutory rights may have a traditional property aspect, statutory rights without that aspect are certainly entitled to no less protection. Without attempting exhaustively to catalogue all of the non-property interests that Congress sought to vindicate through the statutory scheme, we simply note that it is peculiarly within Congress' prerogative to deem particular interests worthy of protection and whether or not an interest has a property aspect is irrelevant for determining whether Congress has created a comprehensive enforcement scheme to protect it.

For example, the allegations related to paternity establishment clearly implicate an interest Congress was determined to protect. Congress explained the importance of paternity establishment separate and apart from the opportunity to gain money and other financial support. As explained in the Committee report, a "child's right to support, inheritance, *and to know who his father is* deserves the higher social priority." S.Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8155. For more than 13 years, plaintiff Rogers has sought assistance in establishing legal paternity for her son, to no avail. Her son has continuously been deprived of an interest Congress singled out for vindication. The fact that OCSE can audit Arizona's paternity services, identify the deficiencies, impose and subsequently waive a 1% penalty, and continue to periodically monitor the state's program, provides no redress for young Rogers' 13-year journey through familial limbo nor does it adequately prevent similar experiences from recurring. Moreover, the administrative process, according to plaintiffs, has had virtually no effect on improving Arizona's services.

Carelli catalogued the detailed provisions of the Title IV-D auditing scheme and equated them with a detailed remedial scheme. However, the purpose of auditing is to evaluate and reveal problems. Auditing leads to the development of corrective action plans. A corrective action plan identifies the steps the state should take in order to bring itself closer to substantial compliance. Auditing and corrective action plans are not themselves remedies.

The only administrative mechanism that truly falls into the "remedial" category is the penalty provision –

the scale by which states' federal funding is incrementally reduced for failure to substantially comply. At best, this can be characterized as a "public remedy." When closely scrutinized, one realizes that such a remedy fails to satisfy the same needs as a private remedy. As plaintiffs point out, a fiscal penalty on the state fails to vindicate the interests of the statutory beneficiaries; in fact, it serves to reduce funding that would otherwise be available to those members of the plaintiff class who are AFDC recipients. Moreover, the "penalties" here are not inherently remedial in nature. A state may "rationally" decide that it is less expensive to lose the 1 to 5% AFDC funds than to make the necessary expenditures to meet the federal requirements. In any event, the state's legal options in this case are limited to two: 1) it may accept federal funds and comply with the conditions attached to them; or 2) it may opt against participating in the program at all. Arizona has elected to participate in the AFDC program, and accordingly, it must fulfill its part of the contract. It cannot simply extract benefits while reneging on its concomitant obligations. See Rosado, 397 U.S. at 425, 90 S.Ct. at 1225 (Douglas, J., concurring) ("As long as a State is receiving federal funds [ ] it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds.").

The *Carelli* court justified its holding by relying on Supreme Court dissents in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). On the basis of these dissents, the court reasoned that utilizing § 1983 to enforce statutory rights against states undermines federalism principles and intrudes on state sovereignty.

Although the *Carelli* court's philosophical concerns may be shared by some commentators, the continued vitality of the *majority* opinions in *Thiboutot* and *Pape* has not been called into question.[13] The availability of a § 1983 action to enforce statutory rights is well settled. Given our responsibility to enforce congressional legislation and to respect binding Supreme Court authority, there can be no legitimate question as to the conclusion we must reach in this case.

II. Equitable Power of the Court

Both in their briefs and at oral argument, the defendants offered an alternative basis for affirming the district court. They argued that the district court's order can be characterized as a determination that equitable relief was unwarranted on the facts of this case. Rather than ruling that a § 1983 action is unavailable for Title IV-D violations, the state contends that the district court simply exercised its broad discretion to conclude that the

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[13] A similar argument was rejected in *Rosado*. Although the Court viewed "with concern" the "escalating involvement of federal courts in [the] highly complicated area of welfare benefits," the Court found that this was not sound reason for concluding that judicial relief in these areas was unavailable. 397 U.S. at 423, 90 S.Ct. at 1223. As the Court explained:

> "It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use."

Id. at 423, 90 S.Ct. at 1223.

facts of this case do not warrant issuance of an injunction at this time. Under the state's view, the factors counseling against an injunction are the federal agency oversight process, the state's commitment to improve Title IV-D services as evidenced by its recent correct action plan, and HHS's approval of that plan.

We have serious doubts that the factors cited by the state would justify the withholding of judicial discretion.[14] Equally important, however, the district court's order is wholly inconsistent with the construction the state would have us give to it. Accordingly, we unqualifiedly reject the state's argument. The district court expressly relied on *Carelli* to justify its decision. *Carelli* explicitly rests on the conclusion that a § 1983 action is precluded by the Title IV-D enforcement scheme. Moreover, the district court directly referred to this § 1983 analysis in its description of *Carelli*. See Order at 7. Additionally, the only way the district court could have

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[14] Moreover, such a resolution of the case would be premature at best. The district court cannot properly balance the equities when there is no adequate factual record on which to do so. The defendants attempt to obscure the lack of a sufficient factual record by pointing to the corrective action plan it submitted with its motion to dismiss and listing a multitude of steps the state was promising to take to improve its Title IV-D program. As the plaintiffs point out, there was no evidence before the court that the plans were in fact being implemented, the corrective action plan relied on by the defendants was due to expire six weeks prior to the district court's judgment, and there was no evidence before the court that the CAP had been successfully implemented. In fact, the state's internal audit (initiated after the last HHS audit before the court) suggested that no significant improvement in the state's implementation of its program had been made.

reached the issue of the appropriateness of injunctive relief was to have first decided that the plaintiffs had a valid cause of action. Such a conclusion is clearly inconsistent with its references to and reliance on *Carelli*.

We express no opinion as to the ultimate necessity of the issuance of an injunction on remand. We reverse based solely on the basis of our legal conclusion that a § 1983 action is available to class plaintiffs. We also note that plaintiffs requested more than an injunction. They also requested declaratory relief. The grant of declaratory relief and injunctive relief may require two separate inquiries. We express no opinion as to the appropriateness or inappropriateness of either.

CONCLUSION

The district court's order granting summary judgment to the defendants rests on the erroneous conclusion that a § 1983 remedy for Title IV-D violations is unavailable to plaintiffs. Because Title IV-D creates enforceable rights in the plaintiff class and because the statute does not contain an enforcement scheme sufficiently comprehensive to preclude a § 1983 action, the district court erred in granting defendants judgment as a matter of law.

REVERSED and REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Congress lodged power in the Secretary of Health and Human Services, and qualified that power by requiring the Secretary to negotiate with the state governments regarding the terms of its exercise. There is nothing in the

law to prevent Governors, Senators and Representatives from telephoning the Secretary to discourage her from overzealous enforcement, which in their view would take too much money away from other important applications.

By creating a private right of action, the majority transfers the power to calibrate the intensity of enforcement efforts from political officials to federal judges. Unlike the Secretary, their decisions cannot be made in a political process, informed by considerations of cost, benefit, and competing claims for money. The people who are to be heard in district court are the lawyers for the parties, not elected officials. Transferring decision making power to the judiciary would be appropriate if there were some law to be enforced for the benefit of a claimant. But there is not. The law at issue says, in substance, that states are supposed to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough.

What this lawsuit seeks to accomplish is to lodge the power to decide if the states are trying hard enough, and whether their plans to try harder are good enough, in federal judges instead of the Secretary of Health and Human Services. That is contrary to what Congress did. If plaintiffs win the injunction they seek, then probably the district judge will, if the case is handled like many agency continuing injunction cases, appoint a standing master to supervise enforcement. The master will recommend to the district judge how many attorneys and investigators the attorney general should hire and how rapidly the assistant attorneys general should conclude each step of a case. The state will be required to spend however

much money it costs to do what the district court decides would achieve "substantial compliance."

The district judge, unlike the state legislature, will not be balancing the child support enforcement unit's requests for money against the requests for money of all the other state agencies. Nor will the judge consider taxpayers' preferences for keeping more of their money. The judge's audience will be the legal services lawyers, the assistant state attorneys general, and the judges on our court. That is a different audience, presenting different pressures and incentives, from the elected officials of the state, the federal officials, and the state electorate.

Our analytic task is to reconcile *Suter v. Artist M.*, 503 U.S. 347, 348-54, 112 S.Ct. 1360, 1363-65, 118 L.Ed.2d 1 (1992), with *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 500, 110 S.Ct. 2510, 2513, 110 L.Ed.2d 455 (1990), and apply the principles of those cases to the statute in this case. In *Suter*, Congress had provided for federal reimbursement to state foster care and adoption programs. A class action claimed that the state was not making reasonable efforts to prevent removal of children from their families and reunite families after children had been removed, because not enough caseworkers were assigned. The district court, on behalf of the private claimant class, enjoined the state to assign a caseworker to each child within three working days, and the court of appeals had affirmed. *Suter*, 503 U.S. at 348-54, 112 S.Ct. at 1363-65 (1992).

The Supreme Court reversed in *Suter*, on the ground that private individuals had no right to sue for enforcement of the statute. *Id.* at 363, 112 S.Ct. at 1370. The Court

assumed that the children were intended beneficiaries of the statute. *Id.* at 357, 112 S.Ct. at 1367. The Court held that the "reasonable efforts" standard in the act did not "unambiguously confer" enforceable rights. Even if the statutory enforcement mechanism were not so comprehensive as to allow no room for private remedies, the scheme "does not make the reasonable efforts clause a dead letter" without a private remedy. The states had no statutory duty to do anything more than submit a plan for approval of the Secretary of Health and Human Services. *Id.* at 359-62, 112 S.Ct. at 1368-69.

Our case is like *Suter*. The "substantial compliance" standard does not "unambiguously confer" enforceable rights on any individual. The federal standards are for such matters as rates of identification of noncustodial parents of illegitimate children and ratios of staff to caseload in state agencies.[1] Congress, by the use of the word

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[1] Under 42 U.S.C. § 652(a), the Secretary has the duty to establish a unit in the Department of Health and Human Services to perform the following tasks, among others:

> (1) establish such standards for the State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;
>
> (2) establish minimum organizational and staffing requirements for State units engaged in carrying out such programs under plans approved under this part;

"substantial," expressly provides that enforcement need not be 100%. The formulas in the statute and regulations are exceedingly complex, but generally provide for percentages, such as 75%, and say that if the state does what it is supposed to do 75% of the time, that is good enough. *See* 42 U.S.C. §§ 602(a)(27), 652(g); 45 C.F.R. § 305.20(d)(2). The number and elaborateness of the provisions necessarily makes the decision about whether compliance is "substantial" a highly discretionary one. *See* 42 U.S.C.

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(3) review and approve plans for such programs;

(4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part as may be necessary. . . . .

(5) assist States in establishing adequate reporting procedures. . . .

(6) maintain records of all amounts collected and disbursed under programs established pursuant to the provisions of this part and of the costs incurred in collecting such amounts;

(7) provide technical assistance to the States to help them establish effective systems for collecting child and spousal support and establish paternity;

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating state against the absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications.

§ 652(g)-(h); 45 C.F.R. §§ 305.21, 305.24, 305.98. No custodial parent can say, under this statute, "Congress gave me a right to have the state do something in my case which it is failing to do." Even if the state substantially complied, one out of four custodial parents would find herself or himself within the unfortunate 25%.

Our case is also like *Suter* in that the statute does not become a "dead letter" without private enforcement. The Secretary has the power to take away enormous amounts of money from states which do not do what she says. It is also like *Suter* in that Congress provided that even if the state is not in "substantial compliance," it need not achieve "substantial compliance" to keep the money. The state need only satisfy the Secretary that its "corrective action plan" is "sufficient to achieve substantial compliance." 42 U.S.C. § 603(h); 45 C.F.R. § 305.99. The State governments have no reason to suppose, from the text of the statute, that they have to satisfy federal judges as well as the Secretary of Health and Human Services with their child support collection procedures, or else lose AFDC money.

Wilder is not like the case at bar. In *Wilder*, the federal money at issue was going to private health care providers, not, as in the case at bar, to state governments. *Wilder*, 496 U.S. at 500, 110 S.Ct. at 2513 (1990). Congress said that the amount had to be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *Id.* (citing 42 U.S.C. § 1396a(a)(13)(A)). The Virginia Hospital Association sued for an injunction to require higher rates, claiming that they were being paid too little money per day. If they

won, the practical effect, unlike the case at bar, would be that the plaintiffs would get more money.

The Supreme Court held in *Wilder* that the health care providers could sue for enforcement under section 1983, because they were a class meant to be benefitted by the statute, and the right was not so "vague and amorphous such that it is beyond the competence of the judiciary to enforce." *Wilder* notes that lack of a private remedy would render the scheme "essentially meaningless," "a dead letter" *Id.* at 509-15, 110 S.Ct. at 2517-20 (internal quotations omitted); *cf. Suter*, 503 U.S. at 359-61, 112 S.Ct. at 1368-69 ("absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter"). The Secretary had "limited oversight," so would not be assuring that the rates were adequate. The state administrative procedure allowed health care providers to challenge only their individual payments, not the method by which the rates were determined. These limitations would make the statutory rate standard, "reasonable and adequate to meet the costs," a "dead letter" if the private right of action were not allowed. *Id.*

Evidently legal services offices around the country have been bringing test cases like the one at bar in numerous circuits, and have won some and lost some. The Eleventh and Sixth Circuits have held that the statute does not create a private cause of action. *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir.1989); *Carelli v. Howser*, 923 F.2d 1208 (6th Cir.1991). The First and Eighth Circuits have found a private cause of action. *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir.1993); *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir.1993).

The First Circuit case, which held that there was a private right of action, is like *Wilder* and unlike the case at bar in a significant way. The section at issue in *Albiston* entitles custodial parents on welfare to "prompt payment" of the first $50 of each child support payment the state collects from the noncustodial parent. 42 U.S.C. § 652(i). The Secretary defined "prompt payment" as payment within 15 days. 45 C.F.R. § 302.32(f)(2). Maine was taking two to six months to send the custodial parents their $50 checks. The court held that the custodial parents had standing to sue the Maine Commissioner to get their $50 pass through payments. The First Circuit found that a different statute did not give rise to a private right of action, where the duties it imposed were on the Secretary to make the states do a good job, rather than on the states, a situation more analogous to the case at bar. *Stowell v. Ives*, 976 F.2d 65 (1st Cir.1992).

Albiston is like *Wilder* in that there was (1) a standard capable of judicial application, (2) a law benefitting the individuals bringing the lawsuit, and (3) the claim by their lawyer would cause money to which they were entitled to be paid to the members of the class represented. It is also like *Wilder* in that, if plaintiffs won, they would get money.

By contrast, in the case at bar, if the nominal clients asked their lawyers what was in it for them if they won, their lawyers would have to tell them that win or lose, they could not be assured of any money. Their lawyers ask for a declaratory judgment that Arizona is not in "substantial compliance," and an injunction requiring "affirmative measures sufficient to achieve as well as

sustain substantial compliance." They seek attorneys' fees, but no money for their clients.

Even if the plaintiffs won, and even if the district judge or special master turned out to be a far better administrator of the child support enforcement division than the state Attorney General, no particular custodial parent could be assured of a dollar more than he or she gets now. A substantially complying child support enforcement unit would still fail to collect from a noncustodial parent who could not be located, or who was dead, unable to pay, or successful in avoiding collection attempts. Most of us who, as attorneys, have attempted collection work for clients have sometimes failed, and few of us have collected 100% of the money due 100% of the time.

The clients in this litigation provide a platform on which their lawyers can stand to have their voices heard in the administrative decisionmaking for the agency, and to collect attorneys' fees. This is what legal services lawyers call "impact litigation," designed to change social policy, not to get something for a client. *Cf. Snake River Farmers Assn. v. Department of Labor*, 9 F.3d 792, 798 (9th Cir.1993). By contrast, in the First Circuit case, if the very poor clients asked "what's in it for me if we win," the lawyers could say "$50, right away, for each of you." Likewise, in *Wilder*, the lawyers could tell their clients that if they won, they would get higher fees.

The absence of any assured private benefit from the remedy suggests that no private remedy was intended by

Congress. Compare the proposition, in the law of standing, that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). *Suter* says that "the burden is on respondents to demonstrate that Congress intended to make a private remedy available." *Suter*, 503 U.S. at 363, 112 S.Ct. at 1370. *Wilder* says that a person can sue under § 1983 unless that statute does not create an enforceable right under § 1983, as where "the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " *Wilder*, 496 U.S. at 509, 110 S.Ct. at 2517. Where the lawsuit would not produce a probable concrete benefit for the plaintiff, we can infer that Congress did not create a private right of action for that plaintiff. This factual distinction distinguishes *Suter* from *Wilder* in a manner which makes sense of both cases.

Plaintiffs' lawyers do not, in their complaint, ask for an award of money to their clients. Instead, they ask for a "declaratory judgment determining that operation of the Arizona Title IV-D program violates controlling substantive provisions of federal law creating rights," and for a permanent injunction with continuing supervision to bring about substantial compliance.

Plaintiffs did not sue the Secretary, and claim that she is not performing her duty to muscle the state into substantial compliance. Yet Congress gave to the Secretary, not the courts, the authority and discretion to decide whether state governments were substantially complying, and to negotiate plans to bring them into substantial compliance if they were not. Inferring a private right of

action, as the majority opinion does, subverts this scheme, and gives the district courts power parallel or superior to the Secretary's to supervise state child support enforcement divisions. Congress established a political process, not a judicial one, to manage this administrative task.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CATHY FREESTONE, et al., Plaintiffs, vs. CHARLES E. COWAN, etc., Defendant.	No. CIV 93-100 TUC ACM ORDER (Filed Aug. 12, 1993)

I. OVERVIEW:

Pending before the Court is Defendant's Motion to Dismiss this case. The Court held a hearing in regards to this motion on July 26, 1993.

II. FACTS:

The plaintiffs are all mothers who claim to be entitled to receive child support enforcement pursuant to Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.* (Title IV-D). The Defendant is the head of the Arizona Department of Economic Security and, in his official capacity, is in charge of the state Title IV-D program. Plaintiffs allege that the defendant failed to comply with federal statutes and regulations which require the defendant to provide efficient services to locate absent parents, establish paternity, establish support obligations through court orders, and enforce existing support orders. Plaintiffs filed this action under 42 U.S.C. § 1983, requesting the Court to

declare the state program deficient in following the federal statutory requirements. They further request a permanent injunction prohibiting the continued practice and requiring the program to substantially comply with the mandates of federal law.

One of the many programs contained in the Social Security Act (42 U.S.C. §§ 301 *et seq.*) is the Aid to Families with Dependent Children (Title IV-A) program, 42 U.S.C. §§ 601 *et seq.* In 1975, Congress amended the Social Security Act by adding Title IV-D. Once a state chooses to participate in Title IV-A, it is then required to provide programs for establishment of paternity and child support as well as enforcement in substantial compliance with the provisions of Title IV-D. 42 U.S.C. § 602(a)(27).

To receive federal funds, state IV-D plans must be approved by the Secretary of Health and Human Services (H.H.S.). 42 U.S.C. § 652(a)(3). Subsequent to plan approval, H.H.S. is required to audit a state's program at least once every three years to ascertain a state's compliance with IV-D requirements. 42 U.S.C. § 652(a)(4). If an audit ascertains that a state has failed to substantially comply with Title IV-D requirements, H.H.S. must reduce the state's funding based upon a predetermined formula. 42 U.S.C. § 603(h). Penalties may be suspended if a state undertakes corrective action. 45 C.F.R. § 305.99.

Of all the programs encompassed under the umbrella of the Social Security Act, only the IV-D program has, by legislative command, a specific executive enforcement unit. The Office of Child Support Enforcement (O.C.S.E.) was separately created by the Secretary of H.H.S. to carry

out regulatory duties under Title IV-D. O.C.S.E.'s functions as set forth by statute are:

> (1) establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;
>
> (2) establish minimum organizational and staffing requirements for State units engaged in carrying out such programs under plans approved under this part;
>
> (3) review and approve State plans for such programs;
>
> (4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part as may be necessary to assure their conformity with the requirements of this part, and, not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 603(h)(1) of this title, or which is operating under a corrective action plan in accordance with section 603(h)(2) of this title), conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 603(h) of this title whether the actual operation of such programs in each State conforms to the requirements of this part[.]

42 U.S.C. § 652(a)(1)-(4).

The Secretary has also promulgated implementing regulations for this regulatory and enforcement authority. *See* 45 C.F.R. §§ 301 *et seq.* For additional details about the Title IV-D program see *Wehunt v. Ledbetter,* 875 F.2d 1558, 1568-75 (11th Cir. 1989), *cert. den. Brown v. Ledbetter,* 110 S.Ct. 1472 (1990) (Clark, J. dissent), and *Carelli v. Howser,* 923 F.2d 1208 (6th Cir. 1991).

III. DISCUSSION:

Defendant brought this Motion to Dismiss. The Court will treat this Motion to Dismiss as a Motion for Summary Judgment. *See* Rule 12(c), Federal Rules of Civil Procedure; *Fort Vancouver Plywood Co. v. U.S.,* 747 F.2d 547, 552 (9th Cir. 1984).

Defendant's arguments are too innumerable to mention here. For purposes of its analysis, the Court will focus on three of the defendant's arguments: 1) That, under the analysis of *Wehunt,* the recipients of the Title IV-D services were not the intended beneficiaries of the Act and cannot maintain this action; 2) that, under the analysis of *Mason v. Bradley,* 789 F.Supp. 273 (N.D.Ill. 1992), there are no mandatory requirements upon the state and plaintiffs are not the intended beneficiaries; 3) that, even if the Court finds that the plaintiffs are the intended beneficiaries, the *Carelli* rationale bars an action under § 1983 because the plaintiffs' complaints are the subject of a pending federal audit. The Court will address these arguments in the above order.

1. Whether the Plaintiffs are the Intended Beneficiaries:

Wehunt also was a § 1983 action against a state's Title IV-D program which was brought by recipients of the state program. In *Wehunt,* the majority held that the plaintiffs were not the intended beneficiaries and had no enforceable right under § 1983. *See Wehunt,* 875 F.2d at 1563-68. This Court declines to follow the holding in *Wehunt.* At the outset, this Court notes that the majority in *Wehunt* appears to have combined two separate and distinct tests. The *Wehunt* majority first explained the test of whether a cause of action exists under § 1983. *Id.* at 1563. The majority then combined that test with the test described in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 26 (1975). It appears that the Supreme Court treats the tests of whether a cause of action exists under § 1983 and the *Cort* test as two separate and distinct analyses. *See, e.g., Suter v. Artist,* 112 S.Ct. 1360 (1992). The *Cort* test is to determine whether an implied right of action for private enforcement exists. *See Id.* at 1370. While there may be some similarities between the two tests, these two tests cannot be combined to determine whether an action exists under § 1983.

This Court agrees with the analyses set forth under the *Wehunt* dissent and in *Carelli* in holding that the plaintiffs are the intended beneficiaries of Title IV-D. Both *Carelli* and the *Wehunt* dissent detail the specific provisions of Title IV-D which provide services for people such as the plaintiffs. *See Carelli,* 923 F.2d at 1209-12; *Wehunt,* 875 F.2d at 1568-75 (Clark dissent). Although the taxpayer may be an intended beneficiary under Title IV-D, it appears that Congress, through the provisions of the Act,

also wanted people such as the plaintiffs to be intended beneficiaries. Therefore, the Court finds that the plaintiffs are intended beneficiaries under Title IV-D.

2. Whether the Recent Cases of *Suter* and *Mason* Apply to Preclude such an Action:

The recent case of *Suter* involved another provision of the Social Security Act. The Supreme Court held that Adoption Assistance and Child Welfare Act did not create rights enforceable in an action under § 1983, nor did it create an implied private cause of action. *Suter*, 112 S.Ct. at 1365-70. In so holding, the Supreme Court reasoned that one clause in the Act which required "reasonable efforts" to be made in keeping a child in his or her home failed to confer the child beneficiaries a right to enforce the clause. *Id.*

The case of *Mason v. Bradley*, 789 F.Supp. 273 (N.D.Ill. 1992), was a case which applied *Suter* in holding that the plaintiff had no right of action under § 1983. In *Mason*, the district court held that Title IV-D did not require the state program to provide effective services to *all* AFDC applicants. *Mason*, 789 F.Supp. at 276. The *Mason* Court focused on the fact that full compliance with the requirements of Title IV-D was not required, and, therefore, the plaintiff had no enforceable right to such services. *Id.* at 277.

This Court refuses to follow the *Mason* rationale for two reasons. First, in comparing the statute in question in *Suter* with Title IV-D, it is apparent that Title IV-D has several provisions which serviced the intended beneficiaries. In the case of *Suter*, the petitioners essentially relied

on one clause contained within the Adoption Assistance and Child Welfare Act of 1980. *See Suter*, 112 S.Ct. at 1365, 1367. In contrast, the plaintiffs here, as do the plaintiffs in other Title IV-D cases, rely upon numerous provisions to assert their right of action. *See Carelli, supra* and *Wehunt, supra*. Second, this Court questions whether the *Mason* rationale would be applicable in the Ninth Circuit. The *Mason* court stated, "[t]here is no clear requirement that *every* applicant be provided with prompt child support services, and Mason has no enforceable right to such services." *Mason*, 789 F.Supp. at 277 (emphasis added). Ninth Circuit case law indicates that if the requested remedy simply increases the chances of the plaintiff's remedy, then the plaintiff has standing to bring the action. *See Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 689 F.2d 391, 394 (9th Cir.), *cert. den., Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 103 S.Ct. 1523 (1982). Therefore, this Court refuses to follow the rationale in *Mason*.

C. Whether the Doctrine Enunciated in *Carelli* Applies in this Case:

Carelli involved facts substantially similar to the case before this Court. In *Carelli*, the plaintiffs brought a § 1983 action requesting that the court order the state program to substantially comply with federal law. In *Carelli*, the court found that Congress had foreclosed the right to bring a § 1983 action by implementing a federal auditing system. *Carelli*, 923 F.2d at 1212-1216. In short, the *Carelli* court found that the relief sought was merely a "hurry-up" order by the plaintiffs for relief which the audit had

already revealed and HHS had already requested. *Id.* at 1215.

The Court finds the reasoning in *Carelli* to be applicable to the case at bar. *Carelli* involved a program in which a previous audit had determined the state program *not* to be in compliance. *Carelli,* 923 F.2d at 1215. A subsequent audit revealed that the Ohio program still was not in compliance. *Id.* Therefore, the OCSE imposed a penalty upon the state. *Id.* At the time the *Carelli* plaintiffs stood before the court, the state was attempting to implement corrective measures.

The case before this Court presents a similar situation. Apparently, the OCSE conducted an audit on the Arizona program back in 1985 and found the program to be lacking. The state proposed some corrective programs, which were approved by the OCSE. The OCSE did not impose a penalty upon the Arizona program. The OCSE conducted another audit in 1989, and found the state program to be lacking. *See* Defendant's Motion to Dismiss, Exhibits Attached, filed 4/28/93. The OCSE again found the Arizona program to be lacking, but accepted Arizona's corrective proposals. Arizona is attempting to correct the deficiencies. The details of the audit are attached to the Defendant's Motion to Dismiss. In the case before this Court, much like in *Carelli,* the plaintiffs based a large portion of their complaint upon the results of an audit. In the case before this Court, much like in *Carelli,* the plaintiffs seek a § 1983 action requesting that the state program follow the federal mandates.

At the hearing, the plaintiffs placed great emphasis on the case of *Withrow v. Concannon,* 942 F.2d 1385 (9th

Cir. 1991). *Withrow* involved the Food Stamp and Medicaid portions of the Social Security Act in regards to the Aid to Families with Dependent Children (AFDC). In *Withrow,* the statute provided for the potential cutting off of funds if the state program was not in substantial compliance with the federal requirements. *See Withrow,* 942 at 1386-1387. The plaintiffs requested an injunction requiring the defendants to hold hearings and issue administrative decisions under the AFDC within the federally prescribed time limits. The Ninth Circuit reversed the lower court's granting of summary judgment, holding that the mandatory language regarding the state reaching a decision regarding a person's entitlement was separate and distinct from the "substantial compliance" provision. *Id.* at 1387.

This Court believes that there are two primary distinctions between *Withrow* and the case before this Court. First, *Withrow* involved a § 1983 action alleging statutory *and* constitutional violations. Underlying the *Withrow* case was basic subsistence and constitutional concerns as elicited by *Goldberg v. Kelly,* 90 S.Ct. 1011 (1970). The case at bar does not allege any constitutional concerns, but instead involves purely statutory concerns. The second distinction is somewhat related to the first: *Carelli* makes a distinction between "re-capture" and a "benefits" program. The *Carelli* court stated:

> In the typical benefits program, Congress provides funds to states to be distributed, and the primary aim of legislative and executive oversight is to see that the funds are properly accounted for and distributed to persons meeting the eligibility criteria. The role of the states,

> to some degree at least, is passive in that they serve as a conduit for the funds to be distributed. The responsibility of a participating state under Title IV-D is vastly different. They have to set up the machinery to administer and provide the *services* mandated and have the *full* responsibility for recapture of funds.

Carelli, 923 F.2d at 1214 (emphasis in original). Obviously, *Withrow* is a benefits program, whereas *Carelli* is a recapture program.

The Court agrees with *Carelli* in that its ruling is similar to an abstention order. Such an action "is delayed pending the outcome of another proceeding, a proceeding that we feel Congress intended under these circumstances to take precedence." *Carelli* at 1216.

IV. CONCLUSION:

Based upon the foregoing,

IT IS ORDERED THAT the Defendant's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED THAT Judgment be entered accordingly.

Dated this 12th day of August, 1993.

/s/ A. C. Marquez
ALFREDO C. MARQUEZ
Senior Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY FREESTONE, individually, on behalf of their minor children and on behalf of all others similarly situated, SUSAN HARRINGTON, individually, on behalf of their minor children and on behalf of all others similarly situated, SONYA MADRID, individually, on behalf of their minor children and on behalf of all others similarly situated, JUDITH ROGERS, individually, on behalf of their minor children and on behalf of others similarly situated, ESPERANZA LAUSTAUNAU, individually, on behalf of their minor children and on behalf of others similarly situated, Plaintiff-Appellants, v. CHARLES E. COWAN, Director, Arizona Department of Economic Security, in his official capacity Defendant-Appellee.	No. 93-16697 D.C. No. CV-93-00100-ACM ORDER (Filed Dec. 12, 1995)

Before: Reinhardt, Thompson and Kleinfeld, Circuit Judges.

Judges Reinhardt and Thompson have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents. A State plan for aid and services to needy families with children must –

* * *

(27) provide that the State has in effect a plan approved under part D [42 USCS §§ 651 et seq.] and operates a child support program in substantial compliance with such plan;

* * *

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§ 603. Payment to States

* * *

(h) Reduction in amount; child support plan. (1) Notwithstanding any other provision of this Act, if a State's program operated under part D [42 USCS §§ 651 et seq.] is found as a result of a review conducted under section 452(a)(4) [42 USCS § 652(a)(4)] not to have complied substantially with the requirements of such part [42 USCS §§ 651 et seq.] for any quarter beginning after September 30, 1983, and the Secretary determines that the State's program is not complying substantially with such requirements at the time such finding is made, the amounts otherwise payable to the State under this part

[42 USCS §§ 601 et seq.] for such quarter and each subsequent quarter, prior to the first quarter throughout which the State program is found to be in substantial compliance with such requirements, shall be reduced (subject to paragraph (2)) by –

(A) not less than one nor more than two percent, or

(B) not less than two nor more than three percent, if the finding is the second consecutive such finding made as a result of such a review, or

(C) not less than three nor more than five percent, if the finding is the third or a subsequent consecutive such finding made as a result of such a review.

(2)(A) The reductions required under paragraph (1) shall be suspended for any quarter if –

(i) the State submits a corrective action plan, within a period prescribed by the Secretary following notice of the finding under paragraph (1), which contains steps necessary to achieve substantial compliance within a time period which the Secretary finds to be appropriate;

(ii) the Secretary approves such corrective action plan (and any amendments thereto) as being sufficient to achieve substantial compliance; and

(iii) the Secretary finds that the corrective action plan (and any amendment thereto approved by the secretary under clause (ii)), is being fully implemented by the State and that the State is progressing in accordance with the timetable contained in the plan to achieve substantial compliance with such requirements.

(B) A suspension of the penalty under subparagraph (A) shall continue until such time as the Secretary determines that –

(i) the State has achieved substantial compliance,

(ii) the State is no longer implementing its corrective action plan, or

(iii) the State is implementing or has implemented its corrective action plan but has failed to achieve substantial compliance within the appropriate time period (as specified in subparagraph (A)(i)).

(C)(i) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(i), the penalty shall not be applied.

(ii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(ii), the penalty shall be applied as if the suspension had not occurred.

(iii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(iii), the penalty shall be applied to all quarters ending after the expiration of the time period specified in such subparagraph (and prior to the first quarter throughout which the State program is found to be in substantial compliance).

(3) For purposes of this subsection, section 402(a)(27) [42 USCS § 602(a)(27)], and section 452(a)(4) [42 USCS § 652(a)(4)], a State which is not in full compliance with the requirements of this part [42 USCS §§ 601 et seq.] shall be determined to be in substantial compliance with such requirements only if the Secretary determines that

any noncompliance with such requirements is of a technical nature which does not adversely affect the performance of the child support enforcement program.

* * *

---

§ 652. Duties of Secretary

(a) Establishment of separate organizational unit; duties. The Secretary shall establish, within the Department of Health and Human Services a separate organizational unit, under the direction of a designee of the Secretary, who shall report directly to the Secretary and who shall –

(1) establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;

(2) establish minimum organizational and staffing requirements for State unit engaged in carrying out such programs under plans approved under this part [42 USCS §§ 651 et seq.];

(3) review and approve State plans for such programs;

(4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part [42 USCS §§ 651 et seq.] as may be

necessary to assure their conformity with the requirements of this part [42 USCS §§ 651 et seq.], and, not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 403(h)(1) [42 USCS § 603(h)(1)], or which is operating under a corrective action plan in accordance with section 403(h)(2) [42 USCS § 603(h)(2)]), conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 403(h) [42 USCS § 603(h)] whether the actual operation of such programs in each State conforms to the requirements of this part [42 USCS §§ 651 et seq.];

(5) assist States in establishing adequate reporting procedures and maintain records of the operations of programs established pursuant to this part [42 USCS §§ 651 et seq.] in each State;

(6) maintain records of all amounts collected and disbursed under programs established pursuant to the provisions of this part [42 USCS §§ 651 et seq.] and of the costs incurred in collecting such amounts;

(7) provide technical assistance to the States to help them establish effective systems for collecting child and spousal support and establishing paternity;

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating State against the

absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications;

(9) operate the Parent Locator Service established by section 453 [42 USCS § 653]; and

(10) not later than three months after the end of each fiscal year, beginning with the year 1977, submit to the Congress a full and complete report on all activities undertaken pursuant to the provisions of this part [42 USCS §§ 651 et seq.], which report shall include, but not be limited to, the following:

(A) total program costs and collections set forth in sufficient detail to show the cost to the States and the Federal Government, the distribution of collections to families, State and local governmental units, and the Federal Government; and an identification of the financial impact of the provisions of this part [42 USCS §§ 651 et seq.];

(B) costs and staff associated with the Office of Child Support Enforcement;

(C) the following data, with the data required under each clause being separately stated for cases where the child is receiving aid to families with dependent children (or foster care maintenance payments under part E [42 USCS §§ 670 et seq.]), cases where the child was formerly receiving such aid or payments and the State is continuing to collect support assigned to it under section 402(a)(26) or 471(a)(17) [42 USCS §§ 602(a)(26), 671(a)(17)], and all other cases under this part [42 USCS §§ 651 et seq.]

(i) the total number of cases in which a support obligation has been established in the fiscal year for which the report is submitted, and the total amount of such obligations;

(ii) the total number of cases in which a support obligation has been established, and the total amount of such obligations;

(iii) the number of cases described in clause (i) in which support was collected during such fiscal year, and the total amount of such collections;

(iv) the number of cases described in clause (ii) in which support was collected during such fiscal year, and the total amount of such collections; and

(v) the number of child support cases filed in each State in such fiscal year, and the amount of the collections made in each State in such fiscal year, on behalf of children residing in another State or against parents residing in another State;

(D) the status of all State plans under this part [42 USCS §§ 651 et seq.] as of the end of the fiscal year last ending before the report is submitted, together with an explanation of any problems which are delaying or preventing approval of State plans under this part [42 USCS §§ 651 et seq.];

(E) data, by State, on the use of the Federal Parent Locator Service, and the number of locate requests submitted without the absent parent's social security account number;

(F) the number of cases, by State, in which an applicant for or recipient of aid under a State plan approved under

part A [42 USCS §§ 601 et seq.] has refused to cooperate in identifying and locating the absent parent and the number of cases in which refusal so to cooperate is based on good cause (as determined in accordance with the standards referred to in section 402(a)(26)(B)(ii) [42 USCS § 602(a)(26)(B)(ii)]);

(G) data, by State, on the use of Federal courts and on use of the Internal Revenue Service for collections, the number of court orders on which collections were made, the number of paternity determinations made and the number of parents located, in sufficient detail to show the cost and benefits to the States and to the Federal Government;

(H) the major problems encountered which have delayed or prevented implementation of the provisions of this part [42 USCS §§ 651 et seq.] during the fiscal year last ending prior to the submission of such report; and

(I) the amount of administrative costs which are expended in each functional category of expenditures, including establishment of paternity.

The information contained in any such report under subparagraph (A) shall specifically include (i) the total amount of child support payments collected as a result of services furnished during the fiscal year involved to individuals under section 454(6) [42 USCS § 654(6)], (ii) the cost to the States and to the Federal Government of furnishing such services to those individuals, and (iii) the extent to which the furnishing of such services was successful in providing sufficient support to those individuals to assure that they did not require assistance under

the State plan approved under part A [42 USCS §§ 601 et seq.].

(b) Certification of child support obligations to Secretary of Treasury for collection. The Secretary shall, upon the request of any State having in effect a State plan approved under this part [42 USCS §§ 651 et seq.], certify to the Secretary of the Treasury for collection pursuant to the provisions of section 6305 of the Internal Revenue Code of 1954 [26 USCS § 6305] the amount of any child support obligation (including any support obligation with respect to the parent who is living with the child and receiving aid under the State plan approved under part A [42 USCS §§ 601 et seq.]) which is assigned to such State or is undertaken to be collected by such State pursuant to section 454(6) [42 USCS § 654(6)]. No amount may be certified for collection under this subsection except the amount of the delinquency under a court or administrative order for support and upon a showing by the State that such State has made diligent and reasonable efforts to collect such amounts utilizing its own collection mechanisms, and upon an agreement that the State will reimburse the Secretary of the Treasury for any costs involved in making the collection. All reimbursements shall be credited to the appropriation accounts which bore all or part of the costs involved in making the collections. The Secretary after consultation with the Secretary of the Treasury may, be regulation, establish criteria for accepting amounts for collection and for making certification under this subsection including imposing such limitations on the frequency of making such certifications under this subsection.

(c) Payments to States. The Secretary of the Treasury shall from time to time pay to each State for distribution in accordance with the provisions of section 457 [42 USCS § 657] the amount of each collection made on behalf of such State pursuant to subsection (b).

(d) Child support management information system. (1) Except as provided in paragraph (3), the Secretary shall not approve the initial and annually updated advance automated data processing planning document, referred to in section 454(16) [42 USCS § 454(16)], unless he finds that such document, when implemented, will generally carry out the objectives of the management system referred to in such subsection, and such document –

(A) provides for the conduct of, and reflects the results of, requirements analysis studies, which include consideration of the program mission, functions, organization, services, constraints, and current support, of, in, or relating to, such system,

(B) contains a description of the proposed management system referred to in section 655(a)(1)(B) [42 USCS § 655(a)(1)(B)], including a description of information flows, input data, and output reports and uses,

(C) sets forth the security and interface requirements to be employed in such management system,

(D) describes the projected resource requirements for staff and other needs, and the resources available or expected to be available to meet such requirements,

(E) contains an implementation plan and backup procedures to handle possible failures,

(F) contain a summary of proposed improvement of such management system in terms of qualitative and quantitative benefits, and

(G) provides such other information as the Secretary determines under regulation is necessary.

(2)(A) The Secretary shall through the separate organizational unit established pursuant to subsection (a), on a continuing basis, review, assess, and inspect the planning, design, and operation of, management information systems referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)], with a view to determining whether, and to what extent, such systems meet and continue to meet requirements imposed under paragraph (1) and the conditions specified under section 454(16) [42 USCS § 654(16)].

(B) If the Secretary finds with respect to any statewide management information system referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)] that there is a failure substantially to comply with criteria, requirements, and other undertakings, prescribed by the advance automated data processing planning document theretofore approved by the Secretary with respect to such system, then the Secretary shall suspend his approval of such document until there is no longer any such failure of such system to comply with such criteria, requirements, and other undertakings so prescribed.

(3) The Secretary may waive any requirement of paragraph (1) or any condition specified under section 454(16) [42 USCS § 654(16)] with respect to a State if –

(A) the State demonstrates to the satisfaction of the Secretary that the State has an alternative system or systems that enable the state, for purposes of section 403(h) [42 USCS § 603(h)], to be in substantial compliance with other requirements of this part [42 USCS §§ 651 et seq.]; and

(B)(i) the waiver meets the criteria of paragraphs (1), (2), and (3) of section 1115(c) [42 USCS § 1315(c)(1)-(3)], or

(ii) the State-provides assurance to the Secretary that steps will be taken to otherwise improve the State's child support enforcement program.

(e) Technical assistance to States. The Secretary shall provide such technical assistance to States as he determines necessary to assist States to plan, design, develop, or install and provide for the security of, the management information systems referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)].

(f) Inclusion of medical support in child support orders. The Secretary shall issue regulations to require that State agencies administering the child support enforcement program under this part [42 USCS §§ 651 et seq.] petition for the inclusion of medical support as part of any child support order whenever health care coverage is available to the absent parent at a reasonable cost. Such regulation shall also provide for improved information exchange between such State agencies and the State agencies administering the State medicaid programs under title XIX [42 USCS §§ 1396 et seq.] with respect to the availability of health insurance coverage.

(g) Standards for State paternity establishment programs. (1) A State's program under this part [42 USCS §§ 651 et seq.] shall be found, for purposes of section 403(h) [42 USCS § 603(h)], not to have complied substantially with the requirements of this part [42 USCS §§ 651 et seq.] unless, for any fiscal year beginning on or after October 1, 1994, its paternity establishment percentage for such fiscal year is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds –

(A) 75 percent;

(B) for a state with a paternity establishment percentage of not less than 50 percent but less than 75 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 3 percentage points;

(C) for a State with a paternity establishment percentage of not less than 45 percent but less than 50 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 4 percentage points;

(D) for a State with a paternity establishment percentage of not less than 40 percent but less than 45 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 5 percentage points; or

(E) for a State with a paternity establishment percentage of less than 40 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 6 percentage points.

(2) For purposes of this section –

(A) the term "paternity establishment percentage" means, with respect to a State (or all States, as the case may be) for a fiscal year, the ratio (expressed as a percentage) that the total number of children –

(i) who have been born out of wedlock,

(ii) (I) except as provided in the last sentence of this paragraph, with respect to whom aid is being paid under the State's plan approved under part A or E [42 USCS §§ 601 et seq. or §§ 670 et seq.] in the fiscal year or, at the option of the State, as of the end of such year, or (II) with respect to whom services are being provided under the State's plan approved under this part [42 USCS §§ 651 et seq.] in the fiscal year or, at the option of the State, as of the end of such year pursuant to an application submitted under section 454(6) [42 USCS § 654(6)], and

(iii) the paternity of whom has been established or acknowledged,

bears to the total number of children who were born out of wedlock and (except as provided in such last sentence) with respect to whom aid was being paid under the State's plan approved under part A or E [42 USCS §§ 601 et seq. or §§ 670 et seq.] as of the end of the preceding fiscal year or with respect to whom services were being provided under the State's plan approved under this part [42 USCS §§ 651 et seq.] as of the end of the preceding fiscal year pursuant to an application submitted under section 454(6) [42 USCS § 654(6)]; and

(B) the term "reliable data" means the most recent data available which are found by the Secretary to be reliable for purposes of this section.

For purposes of subparagraph (A), the total number of children shall not include any child who is a dependent child by reason of the death of a parent unless paternity is established for such child or any child with respect to whom an applicant or recipient is found to have good cause for refusing to cooperate under section 402(a)(26) [42 USCS § 602(a)(26)] or any child with respect to whom the State agency administering the plan under part E [42 USCS §§ 670 et seq.] determines (as provided in section 454(4)(B) [42 USCS § 654(4)(B)]) that it is against the best interests of such child to do so.

(3)(A) The requirements of this subsection are in addition to and shall not supplant any other requirement (that is not inconsistent with such requirements) established in regulations by the Secretary for the purpose of determining (for purposes of section 403(h) [42 USCS § 603(h)]) whether the program of a State operated under this part [42 USCS § 651 et seq.] shall be treated as complying substantially with the requirements of this part [42 USCS § 651 et seq.].

(B) The Secretary may modify the requirements of this subsection to take into account such additional variables as the Secretary identifies (including the percentage of children born out-of-wedlock in a State) that affect the ability of a State to meet the requirements of this subsection.

(C) The Secretary shall submit an annual report to the Congress that sets forth the data upon which the paternity establishment percentages for States for a fiscal year are based, lists any additional variables the Secretary has

identified under subparagraph (A), and describes State performance in establishing paternity.

(h) Requirement of prompt State response to requests for child support assistance. The standards required by subsection (a)(1) shall include standards establishing time limits governing the period or periods within which a State must accept and respond to requests (from States, jurisdictions thereof, or individuals who apply for services furnished by the State agency under this part [42 USCS §§ 651 et seq.] or with respect to whom an assignment under section 402(a)(26) [42 USCS § 602(a)(26)] is in effect) for assistance in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards.

(i) Requirement of prompt State response to requests for child support assistance. The standards required by subsection (a)(1) shall include standards establishing time limits governing the period or periods within which a State must distribute, in accordance with section 457 [42 USCS § 657], amounts collected as child support pursuant to the State's plan approved under this part [42 USCS §§ 651 et seq.].

APPENDIX E

§ 302.33 Services to individuals not receiving AFDC or title IV-E foster care assistance.

(a) *Availability of Services.* (1) The State plan must provide that the services established under the plan shall be made available to any individual who:

(i) Files an application for the services with the IV-D agency. In an interstate case, only the initiating State may require an application under this section; or

(ii) Is a non-AFDC Medicaid recipient; or

(iii) Has been receiving IV-D services and is no longer eligible for assistance under the AFDC, IV-E foster care, and Medicaid program.

(2) The State may not require an application, other request for services or an application fee from any individual who is eligible to receive services under paragraphs (a)(1)(ii) and (iii) of this section. If an individual receiving services under paragraph (a)(1)(iii) of this section refuses services in response to a notice under paragraph (a)(4) of this section, and subsequently requests services, that individual must file an application and pay an application fee.

(3) The State may not charge fees or recover costs from any individual who is eligible to receive services under paragraph (a)(1)(ii) of this section.

(4) Whenever a family is no longer eligible for assistance under the State's AFDC, IV-E foster care, and Medicaid programs, the IV-D agency must notify the family, within five working days of the notification of ineligibility, that IV-D services will be continued unless the

IV-D agency is notified to the contrary by the family. The notice must inform the family of the consequences of continuing to receive IV-D services, including the available services and the State's fees, cost recovery and distribution policies.

(5) The State must provide all appropriate IV-D services, in addition to IV-D services related to securing medical support, to all individuals who are eligible to receive services under paragraph (a)(1)(ii) of this section unless the individual notifies the State that only IV-D services related to securing medical support are wanted.

* * *

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§ 305.20 Effective support enforcement program.

For the purposes of this part and section 403(h) of the Act, in order to be found to have an effective program in substantial compliance with the requirements of title IV-D of the Act:

(a) For any audit period which begins on or after December 23, 1994, a State must meet the IV-D State plan requirements contained in Part 302 of this chapter measured as follows:

* * *

(3) The State must have and use procedures required under the following criteria in at least 75 percent of the cases reviewed for each criterion:

(i) Collection and distribution of support payments, including: Collection and distribution of support payments by the IV-D agency under §§ 302.32(b) and (f); distribution of support collections under § 302.51; and distribution of support collected in title IV-E foster care maintenance cases under § 302.52;

(ii) Establishment of paternity and support orders, including: Establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4): provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; establishment of paternity under §§ 303.5(a) and (f); guidelines for setting child support awards under § 302.56; and establishment of support obligations under §§ 303.4(d), (e) and (f);

(iii) Enforcement of support obligations, including, in all appropriate cases: Establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4); provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; enforcement of support obligations under § 303.6, including submitting once a year all appropriate cases in accordance with § 303.6(c)(3) to State and Federal income tax refund offset; and wage withholding under § 303.100. In cases in which wage withholding cannot be implemented or is not available and the non-custodial parent has been located, States must use or attempt to use at least one enforcement technique available under State

law in addition to Federal and State tax refund offset, in accordance with State laws and procedures and applicable State guidelines developed under § 302.70(b) of this chapter;

(iv) Review and adjustment of child support orders, including: establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4); provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; guidelines for setting child support awards under § 302.56; and review and adjustment of support obligations under § 303.8; and

(v) Medical support, including: establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4); provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; securing medical support information under § 303.30; and securing and enforcing medical support obligations under § 303.31.

* * *

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§ 305.99 Notice and corrective action period.

(a) If a State is found by the Secretary on the basis of the results of the audit described in this part not to comply substantially with the requirements of title IV-D of the Act, as implemented by Chapter III of this title, the Office will notify the State in writing of such finding.

(b) The notice will:

(1) Cite the State for noncompliance, list the unmet audit criteria, apply a penalty and give reasons for the Secretary's finding;

(2) Identify any audit criteria listed in § 305.20(a)(3) of this part that the State met only marginally [that is, in 75 to 80 percent of cases reviewed for criteria in § 305.20(a)(3)];

(3) Specify that the penalty may be suspended if the State meets the conditions specified in paragraph (c) of this section; and

(4) Specify the conditions that result in terminating the suspension of the penalty as specified in paragraph (d) of this section.

(c) The penalty will be suspended for a period not to exceed one year from the date of the notice if the following conditions are met:

(1) Within 60 days of the date of the notice, the State submits a corrective action plan to the appropriate Regional Office which contains a corrective action period not to exceed one year from the date of the notice and which contains steps necessary to achieve substantial compliance with the requirements of title IV-D of the Act;

(2) The corrective action plan and any amendment are:

(i) Approved by the Secretary within 30 days of receipt of the corrective action plan; or

(ii) Approved automatically because the Secretary took no action within the period specified in paragraph(c)(2)(i) of this section; and

(3) The Secretary finds that the corrective action plan (or any amendment to it approved by the Secretary) is being fully implemented by the State and that the State is progressing to achieve substantial compliance with the unmet criteria cited in the notice.

(d) The suspension of the penalty will continue until such time as the Secretary determines that:

(1) The State has achieved substantial compliance with the unmet criteria cited in the notice and maintained substantial compliance with any marginally-met criteria cited in the notice;

(2) During the corrective action period, the State is not implementing its corrective action plan; or

(3) The State has implemented its corrective action plan but has failed to achieve substantial compliance with the unmet criteria cited in the notice and maintain substantial compliance with any marginally-met criteria cited in the notice. For State plan-related criteria, this determination will be made as of the first full three-month period after the corrective action period. For performance indicator-related criteria, this determination will be made as of the first full four quarters following the end of the corrective action period.

(e) A corrective action plan disapproved under paragraph (c) of this section is not subject to appeal.

(f) Only one corrective action period is provided to a State in relation to a given criterion when consecutive findings of noncompliance are made on that criterion.

Supreme Court, U.S.
FILED
MAR 29 1996
CLERK

No. 95-1441

In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do prescriptions of Title IV-D of the Social Security Act (42 U.S.C. §§ 651-669) vest in custodial parent-beneficiaries rights enforceable in a § 1983 action that may be maintained against the state administrator of a Congressionally mandated child support enforcement program failing to substantially comply with Congress' directives?

PARTIES TO THE PROCEEDING BELOW

Petitioner, Linda J. Blessing, is the Director of the Arizona Department of Economic Security ("the State Director"). She is the successor in office to Charles E. Cowan, who served as State Director during the proceedings below.

Respondents Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers and Esperanza Laustaunau ("Plaintiffs") are proposed class representatives who filed the underlying action individually, on behalf of their minor children and on behalf of all others similarly situated.

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RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiffs hereby oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT OF JURISDICTION

Plaintiffs accept the Statement in the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Plaintiffs accept the State Director's summation beneath the subheadings "Statutory Background" and "Proceedings Below", except in the following respects. The State Director notes that according to an audit conducted by the Department of Health and Human Services ("HHS") following implementation of a "new" corrective action plan, Arizona's child support enforcement program "had achieved substantial compliance" with Title IV-D of the Social Security Act (42 U.S.C. §§ 651-669). Pet. at 5. The State Director does not elaborate on the remark, nor does it enjoy any support in the record.

On the contrary; the record before the Court of Appeals showed that the State repeatedly had failed HHS audits and that its latest corrective action plan was due to expire six weeks after Plaintiffs filed their § 1983 action.

Pet. App. at 3a-4a. The record also contained a contemporaneous report of an internal performance audit by the State Auditor General, in which he concluded that the State's child support enforcement program was "barely functioning." *Id*. The District Court did not take evidence on any subsequent effort to achieve substantial compliance with Title IV-D, before nonetheless granting summary judgment for the State Director.

Plaintiffs also take exception to statements that the Court of Appeals perceived a sharp division of authority over the existence of § 1983 remedies for violations of Title IV-D. The Court of Appeals concluded that it joined an "impressive majority of courts," in holding that Title IV-D vests in custodial parents rights enforceable in § 1983 actions. Pet. App. at 10a. Similarly, contrary to the State Director's view, the Court of Appeals did not recognize "considerable tension" between the analytical approaches taken by this Court in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990) and *Suter v. Artist M.*, 503 U.S. 347 (1992). The Court of Appeals reasoned that because the cases were decided within two years of each other, *Suter* cannot be read as impliedly repudiating "settled legal principles" reiterated in *Wilder*. Moreover, the *Suter* majority cited and relied on *Wilder*, in analyzing federal regulations implementing the statutory scheme at issue in *Suter*. The Court of Appeals therefore viewed *Suter* as complementing *Wilder*, by providing "additional guidance on what is a 'binding obligation' and when an asserted interest may be deemed 'judicially enforceable' ", in an action predicated on 42 U.S.C. § 1983. Pet. App. at 13a-14a.

Plaintiffs cannot concur in the introduction to the Petition's Statement of the Case, at 2-3. The State Director marshals a parade of horribles, led by stock warnings that the decision below will open the floodgates to similar litigation against officials administering Title IV-D programs in the nine states comprising the Ninth Circuit. This specter is unsupported by any tangible indications that like Arizona, those states generally have not succeeded in sustaining substantial compliance with thoroughly elaborated requirements of Title IV-D.

Congress has expressed itself with exceptional clarity in providing that nothing less will suffice so long as states accept federal funding for child support enforcement programs. The prescription is faithful to Congress' judgment that "[t]he problem of welfare in the United States is, to a considerable extent, a problem of nonsupport of children by their absent parents." S. Rep. No. 1356, 93rd Cong., 2nd Sess. *reprinted* in 1974 U.S.C.C.A.N. 8133 at 8145. The State of Arizona is not reduced to a vassal of the Federal Government if the intended beneficiaries of Congress' design may call state officials to account for their continued failure to discharge the definitive obligations Arizona has knowingly undertaken on behalf of custodial parents and their children. The decision below does not contradict other cognizable Circuit authority, any more than it ignores this Court's precedents, nor does it thwart statutory purposes or cast aside elements of standing required by Article III of the Constitution. This Court, therefore, has no occasion to review the decision below.

REASONS FOR DENYING THE PETITION

This case presents the discrete question of whether Title IV-D of the Social Security Act vests in custodial parents rights enforceable in a § 1983 action otherwise maintainable against state officials whose administration of a child support enforcement program does not substantially comply with federal law. The question arises against the backdrop of a program so far from the mark that according to the State Auditor General, "regular support payments were received in only 3% of the approximately 275,000 cases assigned to DCSE and only 25% of these cases have a valid support order established." Pet. App. at 4a n.3. Indeed, on the eve of Plaintiffs' suit, shortcomings in program administration had become so pronounced that "Arizona's Title IV-D program had failed to collect hundreds of millions of dollars in delinquent child support payments." *Id.* The State nonetheless received federal reimbursements for its operating expenses ranging from 66% to 90% of annual costs. Pet. App. at 3a n. 1.

Just as the question presented is grounded in a factual setting that could not be less supportive of the pending Petition, it assuredly is not adrift in the "doctrinal vacuum" the State Director imagines. The precedents of this Court provide ample underpinnings for the decision below, devoid of the foundational cracks the State Director pictures. Pet. at 7. Nor, indeed, does the decision break with other Circuit authority similarly faithful to the teachings of this Court.

1. No Conflict Exists Between the Decision Below and Other Circuit Authorities Entitled to Consideration

The decision below is in accord with *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993) and *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir. 1993) – as well as *Monzon v. Martinez*, 833 F. Supp. 479 (E.D. Pa. 1993); *King v. Bradley*, 829 F. Supp. 989 (N.D. Ill. 1993); and *Behunin v. Jefferson County Dept. of Social Services*, 744 F. Supp. 255 (D. Colo. 1990). The State Director points to two other decisions from the Northern District of Illinois (*Mason v. Bradley*, 789 F. Supp. 273 (1992) and *Oliphant v. Bradley*, 1992 WL 153637 (Feb. 20, 1992)) holding, contrary to *King*, that Title IV-D does not create rights enforceable in § 1983 actions – but must concede that the Seventh Circuit has not passed on the question. The State Director is thus left with her argument that the decision below is directly contrary to *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991) and *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989). The notion proves without merit.

Wehunt was the earliest Circuit decision on the question presented. It has not been followed by the First Circuit (*Albiston*), the Eighth Circuit (*Howe*) or the Ninth Circuit (*Freestone*) – or, indeed, by the Sixth Circuit (*Carelli*). Although the State Director insists that like *Wehunt*, *Carelli* is irreconcilable with the decision below, *Carelli* explicitly rejected *Wehunt's* conclusion that Title IV-D does not create rights enforceable by custodial parents in § 1983 actions. 923 F.2d at 1210-13. In this pivotal respect, *Carelli* and the decision below also are in accord.

Wehunt, moreover, has not been cited by the Eleventh Circuit, or by district courts within it, as authority for propositions integral to the holding the State Director invokes. Those courts presumably have not relied on it for the same reason that *Wehunt* does not constitute good authority opposed to *Albiston*, *Howe*, *Freestone*, and *Carelli*: The Eleventh Circuit's decision was predicated on a mode of analysis since rejected by this Court.

Dissenting in *Wehunt*, Judge Clark argued that the majority resorted to the wrong inquiry in determining that Title IV-D does not vest in custodial parents rights enforceable in a § 1983 action. The majority, he concluded, erroneously analyzed the question in terms of whether the proponents could show that Title IV-D satisfies tests, enunciated in *Cort v. Ash*, 422 U.S. 68 (1978), for implying a right of action on a federal statute. *Wehunt*, 875 F.2d at 1568 (Clark, J., dissenting). Judge Clark's dissent was, of course, well-taken. One year after *Wehunt* was decided, this Court issued its decision in *Wilder*, holding that the Boren Amendment to Title XIX of the Social Security Act creates rights enforceable in a § 1983 action. *Wilder* explicitly rejected the view, taken by the majority in *Wehunt*, that the analysis prescribed by *Cort* applies to determinations of whether provisions of the Social Security Act are enforceable in § 1983 actions:

> This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. *See Cort v. Ash*, 422 U.S. 68, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). In implied right of action cases, we employ the four-factor *Cort* test to determine

> "whether Congress intended to create the private remedy asserted" for the violation of statutory rights. [Citations omitted.] The test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. [Citations omitted.] Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," *Middlesex Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19, 101 S. Ct. 2615, 2625, 69 L.Ed. 2d 435 (1981), these separation-of-powers concerns are not present in a § 1983 case. Consistent with this view, we recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy.
>
> *Wilder*, 496 U.S. at 508, n. 9.

Wilder therefore precludes reliance on *Wehunt*, as still-viable authority contradicting the decision below. The State Director is now left only with her contention that it directly conflicts with *Carelli*.

No conflict exists insofar as *Carelli*, like the decision below, concluded that Title IV-D creates rights enforceable in § 1983 actions. Conversely, in its determination that § 1983 remedies were foreclosed in *Carelli* itself, the Sixth Circuit's opinion displayed doctrinal weaknesses not unlike those fatal to the majority's decision in *Wehunt*: The *Carelli* Court (923 F.2d at 1213) primarily drew on dissenting opinions in *Maine v. Thibotout*, 448 U.S. 1, 33 (1980) (Powell, J., dissenting) and *Monroe v. Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting) to bolster its

view that any grant of the relief then requested by custodial parents would trespass on state sovereignty. The State Director loudly echoes the contention, as though *Carelli's* heavy reliance on dissents in landmark cases were somehow enough to persuade this Court that it, too, ought to revisit such firmly settled questions as whether violations of right-creating federal statutes are actionable under § 1983.

The *Carelli* Court explicitly declined to hold, however, that HHS's mechanisms for rectifying noncompliance with Title IV-D are an absolute bar to § 1983 remedies for custodial parents seeking to vindicate rights that the statute does vest in them. 923 F.2d at 1213. Since then, every Court of Appeals presented with the question has reached the conclusion cogently expressed in *Howe*, 8 F.3d at 1263: "The federal government's authority to audit and impose monetary sanctions does not constitute 'comprehensive' remedies," sufficient to foreclose § 1983 relief for custodial parents at the mercy of a program that fails to substantially comply with Title IV-D requirements creating correlative rights in their intended beneficiaries. *Accord*, *Albiston*, 7 F.3d at 269; *Freestone*, Pet. App. at 23a-31a.

Furthermore, the Sixth Circuit recently conceded that its abstention-like ruling in *Carelli* must be narrowly confined, both in its scope and applicability, to avoid patent conflicts with this Court's precedents:

> However, Defendant has misread our *Carelli* decision, in which we made it clear that, with regard to the statute at issue in that case, "we do not conclude that private action is foreclosed under all circumstances by the comprehensiveness of the remedial process." [Citation and footnote omitted.] Nothing in *Carelli* remotely suggests that mere oversight by the Secretary in and of itself constitutes a remedial scheme so comprehensive as to foreclose a private remedy pursuant to § 1983; such a suggestion would not only be implausible, but would also be contrary to the explicit holding in *Wilder*. *Wood v. Tompkins*, 33 F.3d 600, 612 (6th Cir. 1994).

While *Wood* rightly bowed to the teaching of *Wilder*, *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 48 (1987), constitutes still other controlling authority compelling the same restrictive gloss on *Carelli*, as a case necessarily limited, in its specific application, to exceptional circumstances. The Department of Housing and Urban Development ("HUD") is charged with overseeing the program at issue in *Wright*. HUD not only has authority to audit program administration by state subdivisions and to impose monetary sanctions for non compliance with governing federal law, as does HHS in the case of Title IV-D programs: HUD is otherwise empowered to enforce the requirements of its underlying agreements with public housing authorities, the operations of which it "undoubtedly has considerable authority to oversee . . . " *Wright*, 479 U.S. at 424. Although certainly more comprehensive than the design for HHS oversight of Title IV-D programs, this scheme for administrative enforcement of right-creating federal laws does not foreclose § 1983 remedies for program beneficiaries. *Id.* at 428.

Hence, the decision below proves entirely faithful to dispositive precedents of this Court, in holding (Pet. App. at 26a) that HHS's "generalized powers" of statutory enforcement do not preclude § 1983 actions by custodial

parents in Plaintiffs' circumstances. *Accord, Wright*, 479 U.S. at 428, cited with approval in *Wilder*, 496 U.S. at 522. Indeed, the record before the Court of Appeals showed that HHS's audits, threats of fiscal sanctions and acceptance of state-crafted "corrective action plans" notwithstanding, the Arizona Title IV-D program was barely functioning on the eve of Plaintiffs' suit. This dismal status quo bore no resemblance to the extensive reform efforts, promising substantial compliance with Title IV-D, underway at the time *Carelli* was decided. *See* 923 F.2d at 1215-16. Had the decision below nonetheless barred § 1983 remedies for Plaintiffs, it would sharply conflict with *Carelli*. Conversely, on the record before it the Court of Appeals had sound reason to criticize *Carelli*, insofar as it deemed a demonstrably limited scheme of administrative enforcement sufficiently comprehensive to foreclose Plaintiffs' § 1983 claims.[1] In the meantime, the Sixth Circuit sought, in *Wood*, to conform *Carelli* to the teachings of

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[1] HHS audits are investigatory tools, not remedial measures. Should they reveal non compliance with Title IV-D requirements, HHS can impose modest reductions in federal funding for the state's Title IV-A program – at the expense of Title IV-D beneficiaries receiving AFDC. (Pet. App. at 32a-33a). This is a blunt instrument of doubtful utility, that must be swung at an innocent target, rather than comprehensive remedial machinery directly applicable to the Title IV-D program and usable by its intended beneficiaries. It therefore proves thoroughly incapable of blocking their resort to § 1983 enforcement actions. *Wilder*, 496 U.S. at 520-22, reiterating that "[t]he burden is on the State to show 'by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement' " (*Wright*, 479 U.S. at 423) and that this Court has never held the requirement satisfied except by Congress' explicit provision for remedial mechanisms open to persons with enforceable rights under its

Wilder controlling here. In the face of all these negativing factors, the asserted conflict between *Carelli* and the decision below vanishes.

2. The Court of Appeals Opinion Does Not Conflict With Relevant Decisions of this Court

Citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), the State Director argues that in Title IV-D, Congress did not give states sufficiently unambiguous notice that acceptance of federal funding for child support enforcement programs subjects recipients to the obligations asserted in Plaintiffs' § 1983 claims. That is so, the State Director says, because the statute merely requires

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enactments, irrespective of whether they authorize federal administrators to oversee the States' performance of statutory duties and impose monetary sanctions for non compliance. Similarly, under Title IV-D, corrective action plans amount to nothing more than remedial proposals, unilaterally advanced by State administrators, that cannot possibly shut off all access by program beneficiaries to federal remedies, contrary to *the* rationale for § 1983's enactment. *See, e.g., Wilder*, 469 U.S. at 523; *Wright*, 479 U.S. at 429, so holding with respect to actual state administrative or judicial remedies accessible to persons aggrieved by violations of federal law endowing them with rights nonetheless enforceable in § 1983 actions.

These dispositive realities do not cease to be such under controlling decisions of this Court, merely because – as in *Carelli* – HHS's oversight measures may nudge a particular state toward reforms potentially assuring substantial compliance with Title IV-D. Congress surely did not decide, *sub silentio*, to deny its intended beneficiaries recourse to venerable remedies for deprivations of rights vested in them by the statute, on the chance that HHS occasionally may cajole state bureaucrats into initiating a change of course.

"substantial compliance" with its design, a matter it liberally entrusts to HHS oversight. The State Director also likens this directive to the statutory provision disputed in *Suter*, which this Court held incapable of creating rights enforceable in a § 1983 action. The State Director thus glosses over decisive differences between Title IV-D and the laws at issue in *Pennhurst* and *Suter*.

In *Pennhurst*, this Court concluded that a contested section of the relevant law merely expressed a "congressional preference" for expansive goals, worthy of pursuit, but certainly not compulsory accomplishments. *Wright*, 479 U.S. at 423, quoting from *Pennhurst*, 451 U.S. at 19. Similarly, in *Suter*, the Court considered a federal statute cryptically requiring state grantees to maintain plans calling for "reasonable efforts" to prevent removal of abused and neglected children from their homes and to promote family reunification. Because the directive was not elucidated elsewhere in the law or in any required implementing regulations, it remained too amorphous to impose obligations enforceable in § 1983 actions. 503 U.S. at 361. Title IV-D does not bear any resemblance to either of these enactments.

In vivid contrast, Title IV-D is replete with highly concrete requirements, spelling out the particular services that a child support enforcement program must provide its congressionally intended beneficiaries.[2] *See* Pet. App. at 14a-16a, cataloguing such prescriptions. Title IV-D not only specifies mandatory program functions, but details

[2] *See* Pet. App. at 19a-20a, citing and discussing, *inter alia*, S. Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8146.

the administrative procedures that states must institute, to ensure effective performance of required tasks. *Id.* In complete contradistinction to the legislation in *Suter* (503 U.S. at 357-58), as well as in *Pennhurst*, Title IV-D further prescribes "detailed criteria for measuring compliance with the statute" (Pet. App. at 16a) – thus ensuring that the law's dictates are judicially enforceable.

The State Director otherwise errs in insisting that Congress has merely spoken, in doubtful generalities, of "substantial compliance" with the law's thoroughly elaborated and tightly integrated mandates. Congress has declared that " . . . a state which is not in *full* compliance with the requirements of this part shall be determined to be in substantial compliance with such requirements *only if* the Secretary determines that any non-compliance with such requirements is of a technical nature which does not adversely effect the performance of the child support enforcement program." 42 U.S.C. § 603(h)(3). (Emphasis added.) This is a rigorous standard of compliance with the exceptionally definite duties imposed by the statute, more than sufficient to refute the State Director's contention that Congress has failed to unambiguously alert the states to the performance obligations they undertake in entering into program agreements with the Federal Government.

The State Director concedes that the implementing regulations codified to 45 C.F.R. Part 303 actually require full compliance with the Title IV-D mandates incorporated in them. This prescription eliminates any imaginable doubt about the extent of the duties states owe custodial parents and their children, once they accept

federal funding for two-thirds to nine-tenths of all program expenses. Citing the dissenting opinion in *Wright*, the State Director argues that the Part 303 regulations cannot be invoked to establish the existence of rights enforceable in § 1983 actions because Congress alone has the authority to prescribe correlative obligations. Of course, the underlying premise of this contention is false. It wrongly presupposes that Title IV-D itself fails to impose obligations sufficient to create enforceable rights, a proposition that as Plaintiffs have shown, flies in the face of the statute, this Court's leading precedents and all cognizable Circuit authority.

Furthermore, the dissenting opinion in *Wright* notwithstanding, this Court followed *Wilder* in *Suter*, and thus turned to statutory implementing regulations as a guide to the intendment of a law ostensibly creating rights enforceable in § 1983 actions. *Suter*, 503 U.S. at 360-61, concluding that the regulations failed to identify any statutory duty sufficient for the purpose. Congress, by contrast, has declared in Title IV-D that "the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders and collecting support payments." 42 U.S.C. § 654(13). Among those prescriptions are the Part 303 regulations, that not only are "fully authorized," as were the HUD regulations in *Wright*, 479 U.S. at 420-21, n. 3. They are a set of particular "requirements and standards" dictating full compliance with specified mandates of Title IV-D, that Congress itself has ordered the states to obey.

In short, nothing in *Pennhurst* or *Suter* – or for that matter, the dissent in *Wright* – remotely suggests that this may be a case in which Congress has not clearly put states on notice of the obligations they incur, when they accept federal funding for maintenance and operation of child support enforcement programs. Congress has told the states exactly what they must do, as well as how they must do it – and by what criteria their performance shall be judged. Contrary to the State Director's companion notion, Congress thereby secured such tangible and definite interests of program beneficiaries as a "child's right to support, inheritance, and to know who his father is . . . " S. Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8155.

Equally untenable is the State Director's claim that the decision below "dispenses with" elements of standing imposed by Article III of the Constitution. The contention holds that even if Plaintiffs won substantial compliance with Title IV-D, the upshot would not be "likely" redress for their underlying grievances, as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but only the "speculative possibility" that exists in any case. The State Director ignores the now-controlling averments of Plaintiffs' Complaint, while taking refuge in inapt authority.

Gloomy speculation aside, the State Director principally relies on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973).[3] In that case, however, this Court narrowly held

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[3] The State Director also cites *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). The case is inapposite. *Simon* holds that Article III standing does not obtain where the plaintiffs demand agency action that even if performed, cannot

that "in the unique context of a challenge to a criminal statute," the plaintiff "failed to allege a sufficient nexus between her injury and the government action which she attacks to justify judicial intervention." 410 U.S. at 617-18. The plaintiff demanded an order requiring the district attorney to prosecute the father of her child for failing to pay the support she sought. But the operative statute did "not follow the civil contempt model" (*Id.*) and therefore provide that if held to account by the district attorney, the delinquent father could exonerate himself by paying overdue support. The statute instead "creates a completed offense with a fixed penalty as soon as a parent fails to support his child," so that "if appellant were granted the requested relief it would result only in the jailing of the child's father," rather than in any definite prospect of support for his offspring. 410 U.S. at 618. Devoted exclusively to vindication of society's interest in enforcement of the criminal law, this purely penal regimen bears no resemblance to a Title IV-D program, which must employ methods carefully designed to secure the

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result in redress of their underlying grievances unless it chances to set in motion an attenuated chain of events, at the end of which complex societal arrangements are reordered as the plaintiffs desire. *See Allen v. Williams*, 468 U.S. 737, 759 (1984), citing *Simon*, 426 U.S. at 40-46. The instant case, by contrast, involves such precisely focused, direct action as collection of child support payments under a wage assignment order directed to a particular employer. Similarly, because Title IV-D meticulously prescribes acceptable methods of timely providing services for custodial parents (Pet. App. at 15a-18a), enforcement of its mandates in § 1983 actions does not hand federal courts a roving charter to determine the content and contours of state programs, as the State Director wrongly implies in quoting from *Williams*, 468 U.S. at 759-60.

interests of its intended beneficiaries as directly and effectively as possible.

In the instant case, the prospect of redress for the Plaintiffs is not, therefore, at all remote or speculative. Where, as here, Article III standing is questioned at the pleading stage, this Court " 'will accept as true all material allegations of the Complaint, and . . . construe the complaint in favor of the complaining party . . . ' " *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988), quoting from *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiff Freestone provided the Arizona Department of Child Support Enforcement ("DCSE") with all forms and information necessary for it to obtain a wage assignment from her ex-husband's employer. Pet. App. at 5a. Had the agency timely acted, collection of support would have resulted, without more. While the agency dallied for weeks at a time (*Id.*), Plaintiff Freestone's ex-husband left his job – not, however, to join the ranks of the unemployed, but to take another job at *higher* pay. Pet. App. at 5a. Recurrent agency delays in getting a wage assignment from his new employer again frustrated automatic collection of support, until Ms. Freestone's former husband obtained yet another job. On this occasion, the DCSE did perfect a wage assignment and collect support payments, but only in "sporadic" fashion, due to "continuing irregularities" in the process that the agency has not corrected or even sought to explain. *Id.*

Similarly, Plaintiff Harrington's ex-husband has lived and worked in Arizona at all times since their divorce. Pet. App. at 6a. Plaintiff Harrington herself has repeatedly located her ex-husband and notified the DCSE of his

whereabouts and current employment. The agency simply has failed to obtain wage assignments that would yield immediate support payments. *Id.* Plaintiff Madrid has cause to believe that the DCSE has collected child support in her case, but failed to remit the pass-through payments due her. *Id.* Throughout the last thirteen years, Plaintiff Rogers has sought the DCSE's help in establishing the paternity of her son, so that he can receive benefits due him on his father's social security earnings account. Plaintiff Roger's former husband has acknowledged paternity; in fact, his name appears on their son's birth certificate. The father's whereabouts have been known since Plaintiff Harrington began dealing with the DCSE, which has yet to obtain what should be an uncontested order determining paternity, necessary for perfection of the child's entitlement to social security benefits. Pet. App. at 6a-7a.

All of these allegedly representative cases are rooted in concrete circumstances making it indeed likely that the Plaintiffs will receive redress for their underlying grievances, if the DCSE is directed to perform discrete tasks, as required by Title IV-D, immediately sufficient to secure it. Such a definite likelihood is the antithesis of the speculative possibility presented in *Linda R.S.*, where the plaintiff sought a self-defeating means to her professed end, and in such cases as *Simon*, where the requested agency action held no promise of relief for the plaintiffs unless third parties chose to overhaul institutional policies and practices. Far from "dispensing with" elements of Article III standing, the decision below preserves them, by properly tracking the constitutionally sufficient facts and circumstances of the particular controversies actually at hand.

3. The Decision Below Does Not Undermine the Purposes of Title IV-D or the Civil Rights Act, to the Detriment of Federalism, Child Support Enforcement Programs or Custodial Parents

The State Director's entire line of argument is an appeal to fear, rather than reason, driven by dire predictions without basis in law or experience. The State Director thus conjures images of federal judges usurping state authority over numerous Title IV-D programs, as the decision below serves to overcome the constraints of a sound federalist design. These are badly distorted echoes of concerns voiced, with considerably more restraint, by dissents in *Monroe*, 365 U.S. at 222 and *Thibotout*, 448 U.S. at 33. This Court, moreover, has never questioned the continued validity of either decision in rejecting the minority views that the State Director tries to revivify.

Her attempt certainly does not find a hospitable reception in *Carelli*. It merely reasoned that once a state has committed itself to a genuine overhaul of its Title IV-D program, consistent with HHS audit findings, overlapping equitable remedies for program beneficiaries are not calculated to serve a useful enough purpose to justify their adjudication – so long as effective reform efforts are sustained. 923 F.2d at 1215-16. That is manifestly not this case. *Carelli* nonetheless demonstrates that the federal courts are more than capable of restraining some imagined impulse either to commandeer or trammel on a lasting, productive drive toward substantial compliance with Title IV-D.

The State Director, however, postulates that the courts of the Ninth Circuit cannot be expected to exercise

comparable restraint, despite clear evidence to the contrary in the decision below (Pet. App. at 35a n.14, 36a). She goes so far as to imply that equity itself is scarcely capable of soundly accommodating the interests of HHS, state administrators and custodial parents, should Title IV-D mandates become the subject of private enforcement proceedings under § 1983. This Court, however, has long since concluded that properly measured judicial enforcement of a federal statute is both an attainable and a valuable complement to enforcement by federal administrators, just as judicial passivity in the face of unremedied violations thwarts the purposes of Congress. *Hecht Co. v. Bowles*, 321 U.S. 321, 324-31 (1944).

Thus, in *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court soundly rejected arguments that Congress' provision for approval by HHS of state Title IV-A plans – and for termination by HHS of federal funding, on subsequent noncompliance with Title IV-A – reveals an intent to "close[] the avenue of effective judicial review to those individuals [program beneficiaries] most directly affected by the administration of" state plans. The Court not only was "most reluctant" to make that assumption; 397 U.S. at 420: It found "not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." 397 U.S. at 422.

The State Director simply fails to show that the principles emphatically laid down in *Rosado* do not control the availability of judicial relief for beneficiaries of a Title IV-D program – which is the mandatory, close companion

of the Title IV-A program calling forth the Court's pronouncements in *Rosado*. Hence, nothing of substance survives in the State Director's warning that the decision below has untoward ramifications, antithetical to Congress' intent in enacting Title IV-D, as well as § 1983. The contention remains a makeweight, equally devoid of support in statutory provisions, legislative history and the apposite decisions of this Court.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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No. 95-1441

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Unable to hide the split in the circuits concerning the availability of private actions under 42 U.S.C. § 1983 to enforce the provisions of Title IV-D of the Social Security Act that warrants review by this Court, Respondents attempt to distort the facts, relevant case law, and public policy implications of their suit in a misguided effort to persuade the Court not to hear this case. For example, despite their knowledge that the United States Department of Health and Human Services issued a public letter in 1994 declaring that Arizona had "achieved substantial compliance" with Title IV-D's requirements, Respondents assert that Arizona is not in compliance by referring to alleged improprieties between 1980 and 1992. Similarly, despite the acknowledgment by the majority panel below that "there is a three-way split of authority as to the availability of a § 1983 action to enforce Title IV-D" (Pet. App. at 10a) and that "federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D" (*id.* at 2a), Respondents still assert that no conflict exists between the circuits. Additionally, despite their complaint that the mechanism that Congress designed to enforce Title IV-D's requirements operates "at the expense of Title IV-D beneficiaries receiving AFDC" (Response at 10 n.1), Respondents ignore the indisputable fact that their lawsuit drains valuable resources from recipients of Title IV-D services. Thus, Respondents fail at the factual, legal, and policy levels to dispel the urgent need for this Court to grant review of the issue presented in this case.

STATEMENT OF THE CASE

Respondents' Statement of the Case mischaracterizes this case and the entire Title IV-D program. For example,

Respondents challenge Petitioners' statement that Arizona's implementation of a new corrective action plan prompted the United States Department of Health and Human Services ("Secretary") to find in a follow-up audit that Arizona's child support enforcement program "had achieved 'substantial compliance'" with Title IV-D. (Resp. at 1.) Yet, as Respondents know full well, on September 20, 1994 (after the district court had entered summary judgment, thus preventing Arizona from putting it in the record), the Secretary sent a public letter declaring that "Arizona has achieved substantial compliance." (Reply App. at 1a.)[1]

---

[1] Respondents complain that the State Director did "not elaborate on the remark" that the Secretary determined that Arizona had achieved substantial compliance. (Resp. at 1.) Respondents then refer repeatedly to "the record before the Court of Appeals," pretending that time and events stopped in 1993 when the district court granted summary judgment to the State Director. On the other hand Respondents then argue that the reasoning in *Carclli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), is not applicable to the present case because Arizona's efforts "bore no resemblance to the extensive reform efforts, promising substantial compliance with Title IV-D, underway at the time *Carelli* was decided." (Resp. at 10.) Respondents cannot have it both ways. As the Secretary's letter demonstrates, Arizona had been engaged in extensive reform efforts at the time that the district court issued its decision, and Arizona ultimately achieved substantial compliance through these efforts. (Reply App. at 1a.)

The Response cites to a 1991 State Auditor General report and other facts alleged before 1993 to paint a dismal picture of Arizona's child support enforcement program. Yet Respondents knew about the Secretary's 1994 positive determination when they painted that picture, and they knew from the Answer filed in this case on March 7, 1996, that Arizona's extensive reform efforts had earned recognition in 1994 as the Most Improved Program from the National Child Support Enforcement Association, selection in 1994 for the Exemplary State and Local Award from the National Center for Public Productivity at Rutgers University, which recognizes significant achievement and innovation in state and local government, and commendation in 1995 by the Department of Health and Human Services for exceeding the program performance goals that the state and federal governments jointly established.

The State Director provides this elaboration that Respondents invited not to claim that Arizona's program is perfect, but to (a) expose Respondents' disingenuous attempt to paint an inaccurate picture and (b) show that Arizona would be treated differently if it were located in the Sixth Circuit where the *Carelli* standard applies.

Respondents also attempt to mislead the Court by characterizing corrective action plans as remedial proposals that state administrators unilaterally advance. (Resp. at 10-11 n.1.) The Secretary will approve such plans only if they contain steps necessary to achieve substantial compliance within a period that the Secretary finds to be appropriate, and the Secretary closely monitors States whose plans have been approved to ensure that they successfully implement the plans within that period. *See* 42 U.S.C. § 603(h)(2)(A)(i)-(iii), Pet. App. at 2d. Indeed, the oversight and enforcement scheme that Congress enacted is so comprehensive that it demonstrates Congress' intent not to create privately enforceable rights. *See infra* at 7.

REASONS FOR GRANTING THE PETITION

1. A Conflict Does Exist Between the Decision Below and Those of Other Circuit Courts.

No amount of dodging, twisting, or weaving can avoid the plain truth that even the Ninth Circuit majority panel recognized:

- "Currently, there is a three-way split of authority as to the availability of § 1983 to enforce Title IV-D" (Pet. at 10a);
- "A few courts have concluded that Title IV-D creates no enforceable rights . . . [whereas a] majority of courts has found that it does" (*id.*, citations omitted); and
- "The federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D." (*Id.* at 2a.)

Indeed, despite Respondents' attacks on the validity of the Sixth Circuit's decision in *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), and the Eleventh Circuit's decision in *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), the fact remains that the decisions limit the ability of custodial parents in those two circuits to sue the States, counties or other local units of government that administer their Title IV-D programs. Even under Respondents' reading of *Carelli*, where a plaintiff's complaint seeks relief with respect to the same aspects of a IV-D program that are the subject of an ongoing federal audit, the federal courts in the Sixth Circuit will not permit the plaintiff to maintain the action because to do so could unduly interfere with the oversight functions that Congress has committed to the Secretary. Moreover, under *Wehunt*, residents of the Eleventh Circuit cannot bring an action to privately enforce Title IV-D's provisions at all. *See* 875 F.2d at 1566-68.

It is one thing to disagree with the reasoning behind *Carelli* and *Wehunt*. Respondents will have the opportunity to make this argument in their merits brief. To argue now, however, that the two decisions do not conflict with those of the First, Eighth, and Ninth Circuits is simply wrong. The resolution of this conflict alone is sufficient reason for this Court to grant the Petition.

2. The Ninth Circuit's Decision Conflicts with Relevant Precedents of This Court.

Respondents' assertion that *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1980), and *Suter v. Artist M.*, 503 U.S. 347 (1992), are irrelevant is plainly incorrect. Title IV-D gives the States no notice that acceptance of federal funding for child support enforcement programs will subject States to the obligations asserted in Respondents' 42 U.S.C. § 1983 action. While Title IV-D informs the States that they must attain substantial compliance to avoid an enforcement action by the Secretary, it does not unambiguously inform the States that they may be subject to costly private suits for failing to comply with Title IV-D.

This Court has often characterized Spending Clause programs as contractual in nature. However, these contracts, unlike those entered into between private parties, are permeated by constitutional considerations. In *Pennhurst*, this Court explained that Congress must unambiguously impose any conditions upon the receipt of federal funds under a Spending Clause program:

> Legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we

> enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted). Holding that the provision at issue in *Pennhurst* failed to give such unambiguous notice, the Court reversed the court of appeals' finding that permitted a 42 U.S.C. § 1983 action to enforce the provision.

In *Suter*, the Court similarly refused to permit 42 U.S.C. § 1983 to be used to enforce the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-679a, because it found that the Act did not unambiguously confer any enforceable rights upon its beneficiaries. 503 U.S. at 363. *Suter* is therefore consistent with core principles of federalism because the requirement that a federal act unambiguously confer an enforceable right upon its beneficiaries before they may enforce the right through private suits is simply the correlative of the requirement that States receive unambiguous notice that they will be subject to such suits as a condition of accepting federal funds under a Spending Clause program.

Respondents do not address, much less explain, how a "substantial compliance" standard of seventy-five percent informs the States that by accepting Title IV-A money they are obligated to fund a new entitlement program and substantive, individual rights to child support enforcement services for each custodial parent who requests such services. Such a standard does not provide the unambiguous notice *Pennhurst* and *Suter* require.[2]

---

[2] Indeed, Respondents admitted as much by "accept[ing] the State Director's summation" (Resp. at 1) that "Congress did not explicitly or implicitly authorize a private right of action to enforce" Title IV-D and "Congress expressly granted enforcement authority to the Secretary." (Pet. at 3.)

Moreover, the unique remedial scheme of Title IV-D indicates that Congress did not intend to create rights enforceable by private persons. First, Congress established a three-tiered reduction in funding based on the number of consecutive findings by the Secretary of a State's failure to comply substantially with its Title IV-D plan. 42 U.S.C. § 603(h)(1). Second, Congress permitted the Secretary to suspend the funding reduction, even when a State's Title IV-D program does not substantially comply, if the State submits a corrective action plan that contains steps necessary to achieve substantial compliance. 42 U.S.C. § 603(h)(2). Thus, in some circumstances federal funding is not withdrawn even when the State has not achieved substantial compliance. Again, this shows congressional intent to allow the States the greatest amount of flexibility in coming into compliance and is inconsistent with an intent to permit individual enforcement rights. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1133 (1996) ("the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be imposed upon a state officer under *Ex parte Young* [209 U.S. 123 (1908)] strongly indicates that Congress had no wish to create" "an action under *Ex parte Young* that would expose that official to full remedial powers of a federal court, including, presumably, contempt powers").

Finally, in light of the State's fundamental interest in protecting its sovereignty, *see Seminole Tribe*, 116 S. Ct. at 1122, 1129-30, States should not be subjected to § 1983 suits to enforce Spending Clause enactments (such as Title IV-D) unless the States are given explicit notice and thereby knowingly agree to subject themselves to the full remedial powers of the federal court. In rejecting the

argument that the receipt of federal funds constituted a waiver of sovereign immunity, this Court has stated:

> [t]he Act likewise falls far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity. Thus, were we to view this statute as an enactment pursuant to the Spending Clause, Article 1, § 8 . . . , we would hold that there is no indication that the State of California consented to federal jurisdiction.

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985).

Respondents also dispute Arizona's contention that their Article III standing is questionable because a court could only speculate as to whether the relief they request would redress any particular plaintiff's injuries. Although Respondents may be able to identify additional actions that Arizona could have taken in their cases, they cannot establish that Arizona's failure to take these actions caused them not to receive child support payments or that they are likely to receive payments if Arizona takes the actions. As Judge Kleinfeld noted in his dissent below, even a child support enforcement program that substantially complies with federal requirements may be unable to secure payments from a noncustodial parent who is intent upon avoiding collection attempts. (*See* Pet. App. 43a-44a.) The ex-husbands of Respondents Freestone and Harrington, for example, fall into this category. *See* Pet. App. 5a-6a (fathers changed jobs to avoid meeting their child support obligations).

Congress clearly based the substantial compliance standard upon its understanding that recalcitrant noncustodial parents and other factors beyond a child support enforcement agency's control may dictate whether a particular custodial parent receives child support payments. Congress' recognition that there is no necessary cause

and effect relationship between a child support enforcement agency's efforts to collect payments on behalf of an individual parent and the parent's receipt of such payments indicates that Respondents lack Article III standing and that Congress did not intend the IV-D program to create rights that individual parents could enforce through § 1983 actions.

Thus, the court of appeals decision does conflict with this Court's precedents.

3. The Ninth Circuit's Decision Undermines Principles of Federalism and the Effectiveness of Title IV-D Programs.

Respondents question whether the decision below will engender similar litigation against officials administering Title IV-D programs in the nine States that comprise the Ninth Circuit. (Resp. at 3.) Yet concern about the vagaries of the lower courts' inconsistent rationales and the resulting extreme financial exposure has prompted thirty-nine jurisdictions (thirty-six States – including every State in the Ninth Circuit – plus the District of Columbia, Guam, and the Virgin Islands) to file an amicus brief "urg[ing] this Court in the strongest terms to grant the Petition." States' Amicus Brief at 1.

* * *

Because Congress enacted Title IV-D to achieve a uniform approach to a national problem, child support enforcement program administrators in Plains, Georgia, and Phoenix, Arizona, should operate under the same statutory constructs. The five different court of appeals decisions, together with the differing rationales that many other lower courts have applied, clearly demonstrate that there is no national uniformity on the issue of whether a private cause of action exists under 42 U.S.C.

§ 1983 to enforce the provisions of Title IV-D. It is fundamentally unfair to the Title IV-D administrators, custodial parents, and taxpayers of the various States that their rights and liabilities under this national program are being determined by the happenstance of their residence rather than through the consistent interpretation of the law.

CONCLUSION

For the foregoing reasons and those stated in the Petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 20, 1994

Ms. Linda J. Blessing
Director
Department of Economic Security
1717 West Jefferson Street
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Dear Ms. Blessing:

We have completed a follow-up review to determine whether the Arizona Child Support Enforcement (IV-D) program has achieved substantial compliance with the unmet criteria cited in our March 2, 1992 Penalty Notice. Based on the findings of the Follow-up review report (AZ-90-FR1) issued on May 4, 1994, I am pleased to inform you that a determination has been made that the State has achieved substantial compliance and the penalty is hereby rescinded.

The initial audit conducted for the period January 1 through December 31, 1989, indicated that Arizona had been found not to have complied substantially with the requirements of Title IV-D of the Social Security Act. On March 2, 1992, Arizona was informed that total payments

to the State under Title IV-A of the Act would be reduced by 1 percent, beginning with the quarter commencing January 1, 1992, and that imposition of the penalty would be suspended if the State submitted a corrective action plan to the ACF Regional Administrator, Region IX, within 60 days of the date of the Notice, and the plan was approved by OCSE.

On July 31, 1992, we notified Arizona that the corrective action plan was approved and imposition of the penalty had been suspended. The corrective action period ended on March 1, 1993. Arizona had the full responsibility for attaining substantial compliance with the unmet criteria cited in the Penalty Notice during the corrective action period.

Arizona's diligence in rectifying the problems identified in our audit has resulted in a recision of the penalty. We appreciate your cooperation in strengthening the Child Support Enforcement program in your State.

Please note that the audit report includes findings that are not addressed in this Notice. These findings involve: (1) Recommendation(s) that the State was not in substantial compliance with title IV-D requirements considered by OCSE to be technical in nature; (2) recommendation(s) regarding financial disallowance(s) or questioned costs; and/or (3) recommendation(s) related to improving program or financial management. The ACF Regional Office will contact the State regarding the audit resolution

process for tracking and clearing these findings, and the specific findings to be covered under the process.

Sincerely,

/s/ Mary Jo Bane
Mary Jo Bane
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(3)

No. 95-1441

Supreme Court, U.S.
F I L E D
APR 10 1996

In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

vs.

CATHY FREESTONE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF HAWAII, ALABAMA, ALASKA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, IDAHO, ILLINOIS, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, AND WYOMING, THE DISTRICT OF COLUMBIA, AND THE TERRITORIES OF GUAM, AND THE VIRGIN ISLANDS, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION

The thirty-six amici States, the District of Columbia, and the Territories of Guam and the Virgin Islands urge this Court in the strongest terms to grant the Petition because the Ninth Circuit's decision threatens the timely and effective collection of child support for millions of children who are dependent upon such support for their survival and well being. The decision, issued by two judges of the Nation's largest and most populous circuit, attempts to usurp for the federal judiciary the difficult and sensitive enforcement issues that Congress intentionally left to the States, subject to oversight by the Secretary of Health and Human Services. Amici believe that authorizing suits by individual applicants for child support enforcement services and giving the federal judiciary oversight and enforcement powers when Congress vested the Secretary with such powers will not only place duplicative and possibly conflicting demands upon the States, but also will divert limited State resources without producing any appreciable benefit. Indeed, amici are convinced that instead of improving the delivery of child support enforcement services, the Ninth Circuit's decision will actually impair the effectiveness of child support enforcement programs, thereby harming the very children whom the two-member majority found to be Title IV-D's intended beneficiaries. Amici urge this Court to prevent this harm by granting the Petition to review and reverse the Ninth Circuit's decision.

INTEREST OF THE AMICI CURIAE STATES

Each of the amici States operates, either directly or through its local government, a child support enforcement program pursuant to Title IV-D of the Social Security Act (the Child Support Enforcement Act) as a condition of participating in the federal Aid to Families with Dependent Children (AFDC) program pursuant to Title IV-A of the Social Security Act. As a condition of receiving federal funding for the programs, the States agree to comply with various federal program requirements.

A sharply divided panel of the United States Court of Appeals for the Ninth Circuit has construed Title IV-D as creating rights enforceable in private suits under 42 U.S.C. § 1983 (the Civil Rights Act of 1871) to compel compliance with the federal program requirements. This ruling strikes at the core of separation of powers and federalism principles that have informed this Court's jurisprudence for well over a hundred years. Although the Ninth Circuit decision joins decisions of the First and Eighth Circuits and the Tennessee Supreme Court, it directly conflicts with decisions of the Sixth and Eleventh Circuits.

REASONS FOR GRANTING THE PETITION

The Petition in this case compellingly identifies (i) the irreconcilable conflicts in the decisions of the Circuit Court of Appeals and other lower courts as to whether Title IV-D is privately enforceable in § 1983 actions, (ii) the conflicts between the Ninth Circuit's decision and

prior decisions of this Court, and (iii) the devastating effects that private enforcement actions will have on the efficiency and effectiveness of Title IV-D programs. The amici States wish to amplify several concerns that make this case especially appropriate for review.

First, this Court has always viewed protection of children's interests, which is at the heart of this case, as a critical concern of the States. *See, e.g., Moore v. Sims*, 442 U.S. 415, 435 (1979), *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). The Ninth Circuit's decision and other decisions that have employed similar reasoning have wrested away from the States their traditional prerogative of deciding how best to enforce child support obligations.

Second, the Ninth Circuit's decision also wrests from the States their traditional prerogative to decide how best to allocate limited State resources among competing priorities and places allocation decisions in the hands of the federal judiciary under circumstances in which no constitutional violations have been alleged. The loss of this prerogative in conjunction with the States' decision to participate in the federal AFDC program violates separation of powers and federalism principles because the States were not unambiguously notified that their participation would subject them to suit by individual applicants for child support enforcement services. The States were therefore deprived of the opportunity to decide whether the burden of being subject to a multitude of private suits would outweigh the benefit of receiving federal AFDC funds.

Third, it is wrong, and contrary to this Court's jurisprudence, to assume that Congress delegated a second layer of oversight responsibility to private litigants and the federal courts. Indeed, in *Suter v. Artist M.*, 503 U.S. 347 (1992), this Court made very clear that enforcement under 42 U.S.C. § 1983 was not to be permitted unless Congress had "unambiguously conferred" private enforcement rights in the underlying statute at issue. The Court of Appeals in this case, like several other appellate courts, has wrongly ignored this test and the principles of federalism and judicial restraint that should properly color the way in which *Suter*'s analysis should be applied in this setting.

Fourth, and perhaps most importantly, the two-member majority essentially rewrote what Congress enacted. For instance, is adopting a substantial compliance standard as a prerequisite to retaining federal funding for Title IV-D programs, Congress recognized that state child support enforcement agencies could not possibly provide every applicant with every service one hundred percent of the time. By authorizing individual actions to enforce Title IV-D, the Ninth Circuit has in effect authorized the federal courts to find that the States must totally rather than substantially comply with Title IV-D's statutory and regulatory provisions. This is a result that neither Congress nor the Secretary intended and that will have a disastrous impact on State finances. Moreover, by creating a private right of action enforceable in federal court, the two-member majority rewrote the remedial scheme Congress envisioned when it vested the Secretary with authority over an elaborate oversight and enforcement program. Two federal judges should not be allowed to

rewrite the remedial scheme that Congress passed and the President approved. *Cf. Seminole Tribe of Florida v. Florida*, No. 94-12, 1996 WL 134309 (U.S. March 27, 1996) ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside [Eleventh Amendment] limitations and permitting an action against a state officer based upon *Ex parte Young*.")

CONCLUSION

The Court should grant the Petition for Writ of Certioari.

Dated: Honolulu, Hawaii, April 10, 1996.

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(5)

Supreme Court, U.S.
FILED
JUL 26 1996
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No. 95-1441

In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 8, 1996
Certiorari Granted May 13, 1996

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Proceedings include all events.
1:93cv100 Freestone, et al v. Cowan

2/22/93	1	COMPLAINT FILED AND NO SUMMONS ISSUED (br)
4/28/93	6	MOTION dismiss plas' cmp by dft [6-1] (caf) [Entry date 04/29/93]
4/28/93	7	EXHIBITS (Re: [6-1] (caf) [Entry date 04/29/93]
6/8/93	14	OPPOSITION by plas to mtn dismiss plas' cmp by dft [6-1] (bee) [Entry date 06/14/93]
6/28/93	18	REPLY by dft (caf) [Entry date 06/29/93]
8/12/93	21	ORDER by Judge Alfredo C. Marquez that dfts mtn for sumjgm is granted and that jgm be entered. (n1) [Entry date 08/13/93]
8/13/93	22	JUDGMENT: by Judge Alfredo C. Marquez that dfts mtn for sumjgm is granted; jgm entered in favor of dft and agnst the pla. terminating case (cc: all counsel) (nl)
8/30/93	23	NOTICE OF APPEAL by Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers, Esperanza Laustaunau from District Court [22-2] (cc: 9CCA/All Counsel) (as) [Entry date 09/07/93]
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1/22/96	27	MINUTE ENTRY Judge Inits: ACM Crt Rptr: R.Bodimer; Status conf. Mandate suspended. Writ of Certorari [sic] pending. [cc: all counsel] [27-1] re: minute entry [27-1] (rl) [Entry date 01/26/96]
3/7/96	29	ANSWER by dft Charles E Cowan (bee) [Entry date 03/13/96]

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9/15/93	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS due 9/29/93,,; appellant's designation of RT is due 9/9/93,,; appellee's designation of RT is due 9/20/93; appellant shall order transcript by 9/29/93,,; court reporter shall file transcript in DC by 11/1/93; certificate of record shall be filed by 11/8/93; appellant's opening brief is due 12/16/93,,; appellees' brief is due 1/18/94; appellants' reply brief is due 1/31/94,,; [93-16697] (dg)
2/11/94	Filed original and 15 copies Appellants' Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers and Esperanza Laustaunau opening brief (Informal: no) 47 pages and five excerpts record in 1 vol.; served on 12/14/93 [93-16697] (ot)
3/16/94	Filed original and 15 copies Appellee Charles E. Cowan brief, 20 pages, served on 3/14/94 minor defcy: no Statement of Related Cases Notified counsel. appellants' reply brief due 4/4/94; minor brief deficiency response due 3/30/94. record on appeal due 4/4/94; (ot)
3/25/94	Filed original and 15 copies Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers, Esperanza Laustaunau reply brief, (Informal: no) 14 pages; served on 3/24/94 [93-16697] (ot)
4/18/94	Filed certified record on appeal in 01 Vols. (total): 01 Clerks Rec; 0 RTs (ORIG) [93-16697] [93-16697] (ot)

2/17/95 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, David R. THOMPSON & Andrew J. KLEINFELD; CJJ. [93-16697] (jr)

10/12/95 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen R. REINHARDT, author; David R. THOMPSON; Andrew J. KLEINFELD, dissenting.) FILED AND ENTERED JUDGMENT. [93-16697] (ot)

10/26/95 Filed original and 40 copies Appellee Charles E. Cowan petition for rehearing with suggestion for rehearing en banc 12 p. pages, served on 10/25/95 (PNL/ALL ACTIVE JDGS) (ot)

12/12/95 Filed order (Stephen R. REINHARDT, David R. THOMPSON, Andrew J. KLEINFELD): denying petition for rhrg and the suggestion for enbanc rehearing is rejected. [93-16697] (ot)

12/20/95 MANDATE ISSUED [93-16697] (jr)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CATHY FREESTONE, SUSAN HARRINGTON, SONYA MADRID, JUDITH ROGERS, and ESPERANZA LAUSTAUNAU, individually, on behalf of their minor children and on behalf of all others similarly situated, Plaintiffs, v. CHARLES E. COWAN, Director, Arizona Department of Economic Security, in his official capacity, Defendant.	No. CIV 93-100 GLO ACM COMPLAINT (For Declaratory and Injunctive Relief) (Filed Feb. 22, 1993)

For their Complaint in the above-entitled action, plaintiffs hereby allege that:

I PRELIMINARY COMPLAINT

1. This is an action for declaratory and injunctive relief alleging that administration of the Arizona state program for collection of child support and provision of various related services required by Title IV-D of the

Social Security Act, 42 U.S.C. §651 *et. seq.*, violates federal law and regulations enforceable by the plaintiffs, on behalf of themselves, their minor children and all others similarly situated, in an action brought pursuant to 42 U.S.C. §1983.

II JURISDICTION

2. For the reasons set forth in paragraphs 82, 84-89 and 143, which plaintiffs incorporate herein, substantive provisions of Title IV-D and its implementing regulations create individual rights that plaintiffs and all members of the proposed class may enforce in an action authorized by 42 U.S.C. §1983.

3. This Court therefore has jurisdiction over the subject matter, pursuant to 28 U.S.C. §§1331(a) and 1343.

III PLAINTIFFS

4. Plaintiff Cathy Freestone is a resident of Thatcher, Arizona, and the custodial parent of minor children, pursuant to a decree of dissolution entered by the Superior Court of Arizona well over a year ago.

5. That decree set forth her former husband's obligations for child support, due and owing monthly, based on his income at the time and on such related factors as the Superior Court then used in making similar determinations.

6. Even though he was employed, plaintiff Freestone's former husband failed to make monthly support payments following entry of their decree of dissolution.

7. Plaintiff Freestone sought assistance from DCSE because she has remained unable to afford the services of private counsel since her divorce.

8. DCSE representatives determined that plaintiff Freestone was entitled to assistance through the State's Title IV-D program; she has remained eligible for and in need of its services since her former husband began flouting his child support obligations more than a year ago.

9. Shortly after she first dealt with DCSE staff, plaintiff Freestone completed all forms they requested of her, as the first step in obtaining a wage assignment order directed to her former husband's employer.

10. Plaintiff Freestone was then told that DCSE would take further action in approximately one month's time, once staff assigned to her case received necessary information from a section of the agency's Phoenix office.

11. When plaintiff Freestone contacted DCSE staff approximately one month later, she was told that the information had not arrived.

12. Plaintiff Freestone volunteered to obtain the missing information herself, did so and provided it to a DCSE representative assigned to her case.

13. DCSE staff later advised plaintiff Freestone that the desired wage assignment order had been filed.

14. In the meantime, however, plaintiffs' former husband had obtained new employment, in which he earned twice the wages paid him at the time the underlying decree of dissolution was entered.

15. Plaintiff Freestone asked that DCSE take action to collect the child support arrearages her former husband still owed, notwithstanding his increase in earnings from an employer not subject to the wage assignment order DCSE finally obtained.

16. DCSE staff informed plaintiff Freestone that they would pursue collection of the arrearages and seek modification of the decree of dissolution, to provide for an increase in her former husband's support obligation commensurate with his present earnings.

17. By the time DCSE finally was prepared to request the aforementioned modification, plaintiff Freestone's former husband had left his high-paying job and returned to more modest employment, in an apparent – and successful – effort to avoid any increase in his monthly support obligation.

18. Although plaintiff Freestone requested an explanation, DCSE caseworkers refused to account for the delay intervening between her former husband's known receipt of a comparatively high-paying job and the agency's completion of a request for modification of the child support obligations in the Freestone divorce decree.

19. In response to her inquiries, DCSE representatives merely noted that the request became pointless, once her former husband abandoned the employment on which it was premised.

20. DCSE staff acting at defendant Cowan's ultimate direction have not taken any timely, effective action, consistent with the specific, concrete requirements of Title IV-D in such cases as plaintiff Freestone presents, to

collect arrearages still owed by her former husband since mid-1991.

21. DCSE caseworkers have obtained a wage assignment order binding on her former husband's current employer, but corresponding support payments to plaintiff Freestone have nonetheless remained irregular.

22. Plaintiff has not received timely, periodic notices from DCSE adequately setting forth current support payments due and disbursed to her; the particular amounts, by month, still owed her since collections under the aforementioned wage assignment became irregular; the causes of such irregularities or the administrative remedies, if any, available to Ms. Freestone.

23. On information and belief, plaintiff Freestone alleges that the omissions on the part of DCSE set forth in preceding paragraphs are largely or wholly attributable to the institutional patterns and practices described in section VI.B. of this Complaint.

24. Plaintiff Susan Harrington is a resident of Apache County and the custodial parent of three minor children, pursuant to a decree of dissolution entered by the Superior Court in 1980.

25. That decree obligated plaintiff Harrington's former husband to pay her $450 per month in child support.

26. In 1980, plaintiff Harrington sought and was determined eligible for Title IV-D services provided by the predecessor to DCSE.

27. Plaintiff Harrington then requested that the States' Title IV-D agency undertake enforcement of the aforementioned child support order, which her former

husband had refused or failed to obey since entry of the underlying decree of dissolution.

28. Plaintiff Harrington has remained qualified for Title IV-D services since she initially requested them, and has tried to cooperate with DCSE as well as its predecessor throughout more than a decade.

29. Between 1980 and 1988, plaintiff Harrington thus completed an agency questionnaire, totalling thirty-seven pages, on three separate occasions, once DCSE staff informed her that the agency had lost her case file.

30. Prior to March of 1990, plaintiff Harrington twice located her former husband after DCSE's parent locator staff proved unwilling or unable to do so, and promptly notified the agency of his whereabouts.

31. On each of those occasions, plaintiff Harrington's former husband succeeded in relocating before DCSE representatives were prepared to take action to enforce his support obligations.

32. On information and belief, plaintiff Harrington alleges that her former husband then knew of DCSE's involvement in her case and enjoyed ample opportunity to conceal himself, thanks to the agency's inordinate delays in initiating enforcement or collection action.

33. In March of 1990, plaintiff Harrington again located her former husband and promptly reported his whereabouts to DCSE staff.

34. DCSE representatives did not attempt to contact her former husband until January, 1991, by which time he had relocated and obtained new employment at places unknown to plaintiff Harrington and the state agency.

35. As of July 1, 1989, plaintiff Harrington's former husband owed child support arrearages of $22,340.30, according to DCSE calculations.

36. Since that time, plaintiff has received two monthly support payments from her former husband, with the assistance of DCSE.

37. On information and belief, plaintiff Harrington alleges that at all times since entry of her divorce decree in 1980, her former husband has lived and held gainful employment in Arizona.

38. DCSE staff acting at the direction of defendant Cowan and his predecessors in office have not taken timely, effective action, consistent with the specific, concrete requirements of Title IV-D in such cases as plaintiff Harrington presents, to locate her former husband; enforce the child support provisions of her decree of dissolution; collect monthly installments thus due her; recover arrearages totalling well over $20,000; or otherwise discharge federally imposed duties owed her, as an ultimate, intended beneficiary of the State's Title IV-D program.

39. On information and belief, plaintiff Harrington alleges that the aforementioned omissions are largely or wholly attributable to extraordinary staff shortages, inordinately high caseloads and unmanageable backlogs besetting all DCSE sections responsible for direct client services, including staff assigned to provide Apache County residents with services required by single parents in Ms. Harrington's circumstances.

40. Plaintiff Sonya Madrid is a resident of Apache county and the custodial parent of four minor children, pursuant to a decree of dissolution entered by the Superior Court on October 9, 1983.

41. That decree obligated plaintiff Madrid's former husband to pay child support monthly, which he has declined or failed to do voluntarily since their divorce.

42. Plaintiff Madrid and her children have received AFDC since 1984, save for a few brief periods in which she held the only gainful employment that she could maintain, as a single parent of four children living in an isolated, rural area.

43. Since 1985, plaintiff Madrid's former husband has lived at various addresses in Leavenworth, Kansas, where he has generally retained employment.

44. Plaintiff Madrid has consistently cooperated with DCSE staff, as required to maintain eligibility for AFDC.

45. Over the last several years, plaintiff Madrid has furnished DCSE with four new addresses for her former husband, in an effort to further collection of child support he owes under their 1983 divorce decree.

46. While plaintiff Madrid's household receives AFDC, her right to such child support remains subject to an assignment in favor of the State of Arizona.

47. Pursuant to Title IV-D, plaintiff Madrid is nonetheless entitled to the first fifty dollars in child support DCSE recovers in a current month and to a portion of any arrearages the agency may collect from time to time.

48. Plaintiff Madrid has never received a fifty-dollar pass-through payment from DCSE, although she alleges on information and belief that the agency has managed to collect enough in current support to entitle her to some such disbursements.

49. From January of 1985 through March of 1991, plaintiff Madrid did not receive any notification from DCSE concerning its collection of child support on her behalf, whether in or for any given month or otherwise; the agency's disbursement(s) of those funds; its recovery of arrearages and disposition of the money; Ms. Madrid's remedies with regard to any such action or omission; or other subjects of a similar nature.

50. In March of 1991, Plaintiff Madrid was sent a DCSE computer printout indicating that the agency had not collected any support in her case during the preceding twelve months.

51. DCSE staff now acting at defendant Cowan's ultimate direction have not taken any timely, effective action, consistent with the specific, concrete requirements of Title IV-D in such cases as plaintiff Madrid presents, to locate her former husband, as necessary; secure enforcement of the child support obligations in the Arizona divorce decree; collect current payments thus owed by her husband; recover arrearages accrued over an unknown number of years since entry of the decree; give Ms. Madrid timely, periodic and adequate notice of collections and disbursements on her account; or otherwise discharge federally imposed duties owed her, as an ultimate, intended beneficiary of the State's Title IV-D program.

52. On information and belief, plaintiff Madrid alleges that the aforementioned omissions are largely or wholly attributable to extraordinary staff shortages, inordinately high caseloads and unmanageable backlogs besetting all DCSE sections responsible for direct client services as well as related accounting functions, including staff assigned to provide Apache County residents with services required by single parents in Ms. Madrid's particular circumstances.

53. Plaintiff Judith Rogers is also a resident of Apache County and the custodial parent of a minor child who will reach majority in the Spring of next year.

54. Plaintiff Rogers knows the identity and whereabouts of the child's father, who has informally acknowledged paternity on more than one occasion and whose name appears on the minor's birth certificate.

55. Paternity, however, has not been formally established.

56. In 1980, plaintiff Rogers applied for and was deemed entitled to services from the State's Title IV-D program, including all services necessary to establish paternity as a matter of law, in the absence of which Ms. Roger's child cannot obtain support or other assistance due him as the offspring of his absent father.

57. On three occasions after 1980, plaintiff Rogers was forced to reapply for DCSE services, because the agency lost her entire case file.

58. Each reapplication required plaintiff Rogers to complete a thirty-seven page questionnaire, even though

her material circumstances had not changed and no intervening event affected her entitlement to Title IV-D services.

59. Throughout the last several years, plaintiff Rogers' son has remained without social security benefits payable on his father's account, which he has urgently needed, given his mother's minimal earnings, and for which he has otherwise qualified, because he cannot demonstrate eligibility until paternity is formally established.

60. DCSE staff now acting at defendant Cowan's ultimate direction have not taken any timely, effective action, consistent with the specific, concrete requirements of Title IV-D in such cases as plaintiff Rogers presents, to bring about a formal determination of her son's paternity and thus discharge federally imposed duties owed Ms. Rogers and her child, as ultimate, intended beneficiaries of the State's Title IV-D program.

61. Such protracted inaction has persisted in the Rogers case because the single largest backlog of DCSE cases exists in the section(s) responsible for services and activities comprising the so-called paternity function.

62. Plaintiff Esperanza Laustaunau is a resident of Santa Cruz County and the custodial parent of a minor child, pursuant to a decree of dissolution entered approximately ten years ago.

63. That decree obligates plaintiff Laustaunau's former husband to provide her with child support in the sum of $175 per month.

64. Beginning in the Summer of 1992, plaintiff's former husband stopped making monthly support payments through DCSE, even though he still maintained his own business and supplemented his income from it through part-time employment with a produce company in the Nogales area.

65. DCSE staff knew or should have known of her former husband's termination of support payments processed through the agency's new automated system, commonly referred to by the acronym "ATLAS".

66. DCSE representatives did not, however, initiate enforcement or collection action in response to a cessation in monthly payments that have not resumed since at least August, 1992.

67. Plaintiff Laustaunau was advised by court personnel to contact the DCSE legal assistance department, and repeatedly attempted, without success, to do so.

68. In November of 1992, plaintiff Laustaunau finally succeeded in reaching an Assistant Attorney General assigned to support enforcement.

69. He then informed plaintiff Laustaunau that action might not be taken in her case because her former husband had charged DCSE with previously collecting amounts in excess of the support he then owed.

70. On information and belief, plaintiffs allege that due to deficiencies in its accounting methods and recordkeeping, DCSE does persist in excessive collections in some cases, without properly adjusting overpayments or taking other action to avoid retaliation from absent

parents thereafter refusing to discharge obligations as they come due.

71. Plaintiff Laustaunau, however, advised the Assistant Attorney General with whom she spoke that she had no notice or indication of any overpayment in her case, and asked when enforcement or collection action, as appropriate, would be initiated on her behalf.

72. She was told that Assistant Attorneys General working with DCSE have "thousands" of cases assigned them and cannot act in any given one by a specified time.

73. Legal staff in the Office of the Attorney General are in fact unable to take timely, necessary action, consistent with the specific, concrete requirements of Title IV-D in such cases as plaintiff Laustaunau presents, due to staff shortages and excessive individual caseloads.

74. Plaintiff Laustaunau has not received support payments for any of the last seven months, nor has DCSE initiated action to enforce her former husband's current obligation or recover arrearages, as Title IV-D and its implementing regulations require in cases lacking any resolution over such an extended period.

IV DEFENDANT

75. Defendant Charles E. Cowan is the Director of the Arizona Department of Economic Security ("DES").

76. As Director, defendant Cowan is ultimately responsible for administration of the Division of Child Support Enforcement ("DCSE"), now an organizational entity within DES.

77. Plaintiffs sue defendant Cowan in his official capacity, for the declaratory and injunctive relief requested hereafter.

V CLASS ACTION

78. Plaintiffs bring this action on behalf of themselves, their own minor children in their custody and a class comprised of the following persons: All custodial parents of minor children and such children, resident in Arizona, who are entitled or become entitled to receive, from or through DCSE, services designed to establish the paternity of minors; locate parents legally responsible for support of their offspring; fix the terms of such obligations; obtain corresponding orders of support from competent courts; enforce those orders, through further judicial proceedings, collection activities or additional means; and otherwise execute related mandates of Title IV-D imposed, by Congress, for the ultimate, intended benefit of qualifying minors and their custodial parents.

79. The proposed class satisfies the express and implied requirements of Rule 23(a):

a) The membership reflects the detailed prescriptions of Title IV-D and, at any given time, is reasonably determinable from data available to DCSE staff.

b) The named representatives and their children qualify for and either have sought or automatically been due one or more of the Title IV-D services mentioned in the class definition, but have not been furnished them in accordance with controlling provisions of federal law.

c) According to contemporary State publications, DCSE is responsible for approximately 275,000, child support enforcement cases alone.

d) The proposed class as, therefore, more than sufficiently numerous to preclude joinder of its individual members, which would prove not merely impracticable but impossible.

e) There are issues of law and fact common to the class, as shown by the averments of paragraphs 80-147 and 149-159, which plaintiffs incorporate herein.

f) The claims of the proposed representatives are typical of those urged on behalf of the class, as similarly demonstrated by the allegations of paragraphs 4-77, 80-147 and 149-159.

g) The named plaintiffs will adequately represent absent class members: The representatives' counsel is well-versed in the subject matter of the present litigation and has demonstrated ability to conduct properly class actions such as the one proposed here.

ii) The proposed representatives have no interests antagonistic to those of absentees, on whose behalf they seek essentially the same remedial orders that they request individually, based upon uniformly applicable theories of relief.

h) Class certification is otherwise proper pursuant to Fed. Rules of Civ. Pro., Rule 23(b)(2): as the averments of paragraphs 80-147 sufficiently establish, this is an instance in which the opposing party, in his oversight and general administration of a public agency entrusted with the same legal interests of all absentees,

has acted and failed to act on grounds necessarily applicable to the entire membership, thereby making declaratory and injunctive relief appropriate with respect to the class as a whole.

VI PRINCIPAL ALLEGATIONS

A. Legal and Administrative Structure of the Title IV-D Program

80. Like all other states, Arizona has elected to and does maintain a basic program of Aid to Families with Dependent Children ("AFDC"), subject to Title IV-A of the Social Security Act, 42 U.S.C. §601 *et. seq.*

81. AFDC is a form of cooperative federalism that seeks to provide for the subsistence needs of dependent children impoverished by loss of parental support, due to divorce and desertion (among other causes). *See* 42 U.S.C. §601.

82. Title IV-A requires that participating states establish and operate an adequate "child support program", pursuant to a plan approved by the Secretary of Health and Human Services ("HHS") acting in conformity with Title IV-D of the Act. *See* 42 U.S.C. §602(a)(27).

83. Title IV-A provides for periodic review, by HHS specialists, of each state's Title IV-D program and specifies sanctions the Secretary may impose if its operation is then found not to comply substantially with requirements detailed in 42 U.S.C. §651 *et. seq.*, as well as implementing regulations at 45 C.F.R. Part 305. See, generally, 42 U.S.C. §602(h).

84. Reduction of federal financial assistance under Title IV-A constitutes the basic penalty the Secretary must order, unless the state timely submits a corrective action plan ("CAP") deemed, by HHS, sufficient – if satisfactorily implemented – to remedy cited deficiencies in Title IV-D program operations.

85. The statute does not afford the Secretary another distinct remedy, either on behalf of the federal government or intended beneficiaries of the child support program, should state Title IV-D operations violate or continue to violate controlling federal standards.

86. The aforementioned HHS reviews of Title IV-D programs are conducted in accordance with highly detailed, specific and concrete prescriptions in 45 C.F.R. Part 305, constituting "such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living" as the Secretary has "determine[d] [are] necessary to assure that such programs will be effective." *See* 42 U.S.C. §652(a).

87. Those governing rules prescribe the percentage of cases, requiring particular forms of action, that must be processed within specified time periods, and otherwise set forth, in both quantitative and qualitative terms, the activities regularly demanded of state Title IV-D programs.

88. The statutory and regulatory design consistently provides that all principal, mandated functions must be

performed for the ultimate benefit and in the best interests of dependent children, as well as their custodial parents – including, among others:

a) determination and establishment of paternity, as a condition precedent to recovery of support for minor children;

b) location of non-custodial parents and investigation of their employment as well as other financial circumstances, in furtherance of child support enforcement and collection efforts;

c) maintenance, as necessary, of proceedings in which valid orders may issue adjudicating child support obligations, the amount(s) thereof and other terms of compliance;

d) maintenance, as necessary, of proceedings to enforce outstanding support orders that have not been obeyed, either in whole or in part;

e) collection activities, authorized by federal or state law, pursuant to valid orders of support;

f) accounting for recoveries from absent parents, regularly notifying custodial parents accordingly and timely disbursing the sums, collected by the Title IV-D program, due such parents for their children's support;

g) publication of the availability of Title IV-D services and the procedures for requesting them at designated places and times.

89. The federal statute requires that the state provide these and other mandated services throughout its

territory, without creating or sanctioning unreasonable local barriers to access by eligible persons.

90. Title IV of the Social Security Act provides that all custodial parents and children in AFDC benefit status shall receive the foregoing services, as necessary, and that those parents must cooperate in efforts to provide them or risk loss of monthly cash assistance.

91. The law contemplates that states will retain a portion of the support recovered by its Title IV-D agency in AFDC-linked cases.

92. It further provides, however, that in the event support payments are thus recovered in an "AFDC" case, the state agency must timely disburse at least a fixed, per-month amount thereof to the custodial parent, and shall "pass through" greater sums if arrearages are collected as set forth in Title IV-D and its implementing regulations.

93. Custodial parents and their children are, of course, not expected to remain on the AFDC rolls for protracted periods and, in the State of Arizona as elsewhere, a majority in fact do not retain uninterrupted benefit status over more than comparatively short intervals, of less than a year's duration on average.

94. Consequently, such Title IV-D services as establishment of paternity and child support orders redound to the substantial benefit of minor children, as well as their custodial parents, long after AFDC payments to them cease and, indeed, may spell the difference between continued self-maintenance and return to the welfare rolls.

95. Federal law also provides that custodial parents and minor children ineligible for AFDC are nonetheless entitled to receive necessary Title IV-D services when properly requested.

96. The state agency must timely disburse to them all support it thus collects on their behalves, although it may levy reasonable charges for services rendered non-AFDC recipients of Title IV-D services.

97. In these cases as well, adequate provision of core services not only confers lasting benefits, of considerable value, on non-AFDC families, but may well ensure that such single-parent households need not resort to AFDC itself.

98. Under Title IV-D, the responsible state agency can earn federal financial credits through collection of support for members of resident AFDC households, but will not derive the same benefit from similar work on behalf of non-AFDC parents and children nonetheless due Title IV-D services.

99. This distinction may operate as a disincentive to provision of services sought by non-AFDC mothers and, plaintiffs allege on information and belief, has contributed somewhat to corresponding deficiencies in the DCSE program, catalogued hereafter.

100. Similarly, if – for example – DCSE locates and obtains support from an Arizona inhabitant who is also a parent absent from a resident California household, it does not receive the aforementioned kind of credit – nor would DCSE's California counterpart in the reverse circumstances.

101. This hiatus in the overarching federal design tends to discourage interstate cooperation, especially on the part of a Title IV-D agency already lacking the capacity to handle the remainder of its caseload satisfactorily.

102. Such a pattern and practice may be met with a reciprocal lack of cooperation on the part of a neighboring Title IV-D agency, so that – in a now-relevant illustration of the problem – the California counterpart to DCSE may become (and, in fact, has become) reluctant to assist DCSE in cases involving parents of resident Arizona children long absent from their offsprings' households and evidently settled in California.

103. The foregoing problem is not merely a product of structural financial disincentives, but of DCSE's pronounced inability to aid neighboring jurisdictions, which have shown themselves increasingly disinclined to help DCSE in pursuing or proceeding against Arizona absentees within their territory.

104. A state Title IV-D agency may enter into contracts with local governments for provision by them of certain federally mandated services.

105. In that event, the state agency retains ultimate responsibility, under federal law, for compliance with all Title IV-D requirements, including those subject to contractual arrangements and those the State continues to manage on its own.

106. The state Title IV-D agency must require corrective action on the part of such contractors, in the event their performance of delegated tasks does not substantially comply with federal standards, and terminate

underlying agreements, if sufficient improvement is not achieved and maintained.

107. Units of local government are not obligated by federal law to enter into Title IV-D service contracts, and remain free to withdraw from any such arrangement.

108. HHS regularly prepares reports to Congress containing quantitative summaries, comparisons and general discussion of the performance of all Title IV-D agencies, including in the aggregated data the contributions of any local government contractors.

B. Structure, Operation and Performance of the Title IV-D Program in Arizona

109. DCSE or its predecessor has remained the designated Title IV-D agency for the State of Arizona since amendments to the Social Security Act, directing establishment and maintenance of the expanded child support program DCSE administers.

110. DCSE maintains contractual or similar arrangements with the Office of the Attorney General, whereby its legal staff provide or assist in the provision of certain services required by Title IV-D, for which DCSE ultimately remains responsible, under federal law.

111. From time to time, DCSE has entered into and maintained contracts with a number of Arizona counties, in which the latter have agreed to perform designated Title IV-D functions on behalf of custodial parents and their children resident in those jurisdictions.

112. DCSE has retained direct responsibility for other mandated, Title IV-D operations that counties declined to undertake when contracting with the state agency or could not reasonably be expected to perform.

113. DCSE has also remained a direct provider of Title IV-D services in those counties that have not entered into or maintained contracts of the aforementioned kind.

114. In addition, DCSE has generally maintained contractual arrangements with at least several clerks of the Superior Court, whereby the clerks manage, *inter alia*, accounting and disbursement of child support collections.

115. During the early part of the last decade, HHS specialists audited DCSE's performance of discrete functions or operations required by Title IV-D and the corresponding state plan.

116. These HHS performance reviews cited technical deficiencies requiring specified improvements, but generally did not inquire into DCSE's handling of such core responsibilities as determination and enforcement of child support obligations.

117. In the 1984-1985 federal fiscal year, HHS staff did conduct a comprehensive examination of core programmatic functions, as then performed by both DCSE and a number of counties under contract with the state agency.

118. The 1984 HHS audit revealed substantial noncompliance with federal requirements governing such operations as establishment of paternity, location of absent parents, pursuit of support orders, enforcement of adjudicated support obligations and collection action.

119. HHS determined that DCSE and its county contractors should be given an opportunity to prepare corrective action plans sufficient – if satisfactorily executed – to remedy substantial deficiencies in virtually all functions and activities central to the Title IV-D program.

120. In 1985, DCSE and those counties did develop a CAP in which they acknowledged decisive shortcomings in their Title IV-D operations and proposed reforms that would be instituted, in phases, over the next three to four years.

121. HHS accepted the 1985 CAP, in lieu of immediate imposition of sanctions otherwise required by federal law, and further agreed that HHS specialists would not audit programmatic functions subject to the CAP, pending its full implementation on the schedule set forth therein.

122. During the next several years allowed for complete institution of CAP requirements, HHS did not audit Arizona's provision of primary Title IV-D services subject to those reform efforts, but confined its performance reviews to technical support functions and activities.

123. Those limited examinations generally revealed non-compliance with some federal requirements applicable to the comparatively few, discrete operations then under scrutiny.

124. Several years have lapsed since the agreed deadline for full implementation of the 1985 CAP, to which DCSE committed itself in a forthright attempt at

not only avoiding HHS sanctions, but rectifying acknowledged, basic deficiencies in nearly all integral parts of the Title IV-D program.

125. HHS staff did not formally scrutinize implementation of the 1985 CAP while it was ostensibly underway, nor have they audited the extent, substance, quality or sufficiency of the Plan's execution at any time after the deadline, which has long since passed, for its complete institution.

126. Furthermore, HHS has not subsequently reviewed performance of the core functions and activities that were the subject of the 1985 CAP, to determine whether or not the state's Title IV-D program substantially complies with federal law and regulations, apart from past efforts – if any – to execute provisions of the 1985 Plan.

127. In a resolution adopted on December 13, 1991, the state's Joint Legislative Oversight Committee called for a report by the Auditor General on the overall operation of DCSE.

128. With the cooperation and assistance of DCSE personnel, professional staff in the Office of the Auditor general conducted a performance audit of DCSE operations the following year.

129. In December of 1992, the Auditor General released a report on the results, simply entitled "Performance Audit – Department of Economic Security Child Support Enforcement" (No. 92-7 December, 1992) (hereafter "the December, 1992 Report,"), a copy of which is

attached hereto and by this reference, incorporated herein.

130. The December, 1992 Report is introduced by a letter, dated December 15, 1992, from Auditor General Douglas K. Norton to Members of the Arizona Legislature, the Governor and defendant Cowan.

131. In it, the Auditor General summarizes the ultimate findings of his 1992 performance audit as follows:

a) "We found the Child Support Enforcement program is barely functioning; only 3 percent of the more than 275,000 cases handled through the program are receiving regular support payments."

b) "Unless significant changes are made, literally hundreds of millions of dollars will continue to go uncollected and hundreds of thousands of Arizona parents and children will suffer the consequences."

132. The December, 1992 Report identified systemic failures to comply with Title IV-D standards, apparent throughout DCSE operations of paramount interest to plaintiffs and the proposed class, and analyzed the principal causes, thusly:

a) Less than a decade ago, all counties contracted with the State, to perform "most" Title IV-D functions in cases involving their residents.

b) By 1986, nine of Arizona's fifteen counties had terminated their contractual participation in the Title IV-D program, leaving DCSE with direct responsibility for thousands of new, diverse cases in various stages of development. (Nineteen eighty-six was also the first, full

year for implementation of the 1985 CAP, which contemplated undertakings by counties – not just DCSE – that instead withdrew altogether from participation in the program.)

c) In 1988, Maricopa County abruptly determined that its departments and divisions would no longer handle any of the title IV-D operations for which it had contracted.

d) Termination of this agreement alone required that DCSE, with little advance notice and no opportunity for preparation, assume direct responsibility over two-thirds of all Title IV-D cases in Arizona, including 35,000 non-AFDC cases added to 60,000 AFDC cases on which the state agency was already performing work for Maricopa County. (Nineteen eight-eight was the last, full year for institution of 1985 CAP reforms, effectively thwarted by DCSE's sudden and unexpected receipt of Maricopa County's uniquely large caseload).

e) DCSE was wholly unequipped, in terms of both staffing and funding, to absorb and then properly manage unprecedented surges in its own caseload, resulting from termination by most counties of their Title IV-D contracts.

f) Those contract terminations not only cost the Title IV-D program considerable funding, in the form of substantial contributions from counties underwriting their participation in it, but became another cause of the program's failure to generate offsetting, federal "incentive revenues".

g) Such incentive revenues are payable to states that achieve sufficiently favorable ratios between sums collected in child support and costs of processing Title IV-D cases.

h) In recent times, DCSE has posted collection (benefit)/cost ratios significantly below the annual national average and, in fact, has not generated sufficient federal "incentive revenues," combined with retainable amounts of support collected in AFDC cases, to offset the state's federally determined share of Title IV-D administrative expenses.

i) Since 1988, DCSE has remained responsible for all Title IV-D cases arising in ten of Arizona's fifteen counties, including Maricopa with over half the total, and for certain mandated functions on which the remaining counties depend, to provide services entrusted to them by contract.

j) Approximately one-half of the 275,000 cases assigned DCSE require extensive development, starting with such threshold tasks as identification and location of absent parents, before actual collection of child support will become a realistic possibility.

k) DCSE cases, however, are so severely backlogged that months frequently elapse before any action, preliminary or otherwise, is taken in more than a small portion, during any given thirty-day interval. (This pattern and practice amounts to longstanding, endemic noncompliance with most, if not all, federal case-processing deadlines and related requirements applicable to core Title IV-D functions.)

l) As of October, 1992, substantive progress had not occurred in 65,220 DCSE cases because absent parents had not been found – and, frequently, had not been the subject of any DCSE-initiated search.

m) By October of last year, over 94,000 DCSE cases required action, of one kind or another, to establish or further establishment of paternity, so that support orders could at least be sought; this cohort comprised the single largest component of the total backlog of cases.

n) Paternity-function cases then encountered lengthy delays between intake and final disposition, with much of the intervening period marked by a complete lack of activity. (The *status quo* a scant three months ago persists in substantially the same form, and represents a protracted, pervasive failure by DCSE to meet most, if not all, federal requirements determining acceptable performance of mandated paternity functions.)

o) In general, whatever the prescribed function or task at hand, fewer than ten percent of all active DCSE cases have received attention in recent, representative months, and in one-third of those, agency action was ministerial or *pro forma* in nature, rather than intended to overcome a substantive impediment to eventual collection of support.

p) In a recent, still-representative month, support was not collected in two-thirds of the cases where legally due and owing (because all conditions precedent – paternity determinations, location of the absent parents, etc. – had finally been satisfied by DCSE); during the first five months of 1992, support was not collected in over half of *all* such cases.

q) Arrearages in those and other DCSE cases processed up to enforceable payment orders total several hundred million dollars, of which $100 million is due the state for AFDC payments to children and custodial parents who never received the support legally due them.

r) For reasons noted in this and other paragraphs of plaintiffs' Complaint, the caseloads of DCSE staff are more than triple a cases-per-worker ratio deemed unacceptably high by experts in the field – a phenomenon that generates overwhelming backlogs, as thousands of new cases are added each month; guarantees protracted inaction in a majority (including those requiring completion of numerous tasks, if any useful service is to be provided); and promotes an approach to workloads whereby only the custodial parents who " 'scream the loudest receive attention.' "

s) An estimated 75 to 80 percent of all DCSE cases remain backlogged and would require, in and of themselves, years of effort to clear.

t) If hiring of all additional caseworkers now envisaged by DCSE occurs as the administration proposes, the state's Title IV-D agency will be left with a cases-per-worker ratio of more than double the figure for the Alabama program, which has been declared seriously understaffed. (While the auditor General has recommended certain, potentially helpful changes in DCSE technology, administrative methods and the legal authority available to it under state law, none of these, singly or in combination, can offset persistent, extraordinary personnel shortages constituting the paramount cause of non-compliance with federal Title IV-D requirements.)

133. DCSE effectively lacks the authority to direct the Title IV-D work of legal staff in the Attorney General's Office, which contributes to fragmentation of programmatic efforts and, thus, impedes compliance with federal law.

134. Similarly, in attempting to bring on line a new automated system for the Title IV-D program, DCSE staff encountered lengthy delays and difficulties arising from innumerable, material errors in case file entries prepared by clerks of the Superior Court, or by county staff responsible for them, before the aforementioned contract terminations.

135. To the extent such practices persist among court clerks determined to handle certain collection and disbursement functions mandated by federal law, DCSE's ability to discharge its related responsibilities will be impaired and numerous members of the plaintiff class will not receive, either timely or at all, the full amount of support payments lost in the clerks' offices.

136. At the time of the performance audit described in the December, 1992 Report, Arizona's Title IV-D program held the lowest ranking among the fifty states, in terms of its collection results, with support regularly recovered in fewer than 3% of all cases in the DCSE system.

137. On information and belief, plaintiffs allege that certain remedial measures proposed by the Auditor General and under consideration by defendant's subordinates (with his knowledge) would violate provisions of Title IV-D or corresponding federal regulations, if implemented,

and, in particular, if instituted for the sole or primary purpose of "triaging" and thus reducing case backlogs.

138. As the December, 1992 Report acknowledges, DCSE has not met federal requirements that it maintain outreach programs which adequately inform non-AFDC parents of the principal Title IV-D services available to them and ways of obtaining them in their communities.

139. Under present circumstances, such mandated undertakings would not further the purposes of federal law, since DCSE could not accept and properly handle additional cases generated through effective outreach efforts.

140. DES prepared a formal response to the 1992 performance Audit by the Auditor General, which appears at the end of the December, 1992 Report, following a cover letter dated December 10, 1992, from defendant Cowan to Mr. Norton.

141. In that correspondence introducing the formal agency (DES) response to the 1992 Performance Audit, defendant Cowan states:

> "DES agrees with the findings and recommendations in the [December, 1992] [R]eport."

142. The text following defendant Cowan's letter does not contain assertions or allegations contradicting or disputing the principal findings and conclusions of the December, 1992 Report.

143. Consequently (and on further information as well as belief), plaintiffs allege that acting at the ultimate direction and with the knowledge of defendant Cowan,

DCSE staff have *inter alia* – regularly and consistently failed to:

a) establish a system for and carry out periodic reviews of low priority or inactive cases at least annually or on receipt of new information, as required by 45 C.F.R. §303.10(B)(6);

b) use all appropriate parent locator resources (including the Federal Parent Locate Service) within seventy-five calendar days of determining that location of an absent parent is necessary, as required by 45 C.F.R. §303(b)3;

c) immediately repeat attempts to locate absent parents whenever new information becomes available and to repeat location attempts at least quarterly, even if no new information is available, as required by 45 C.F.R. §303.3(B)(5);

d) to file actions for paternity determinations or complete service of process to establish paternity within ninety days of locating putative fathers, as required by 45 C.F.R. §303.5(a)(1);

e) prepare and submit to federal as well as state revenue departments all DCSE cases appropriate for state and/or federal income tax intercepts, as required by 45 C.F.R. §303.6(c)(3);

f) refer interstate child support enforcement cases to the responding state's central registry within twenty days of determining that the absent parents are in such other states, as required by 45 C.F.R. §303.7(b)(2), effective October 1, 1990;

g) utilize all appropriate state and local sources, within sixty days of the referral or application of certain custodial parents, to determine the whereabouts of absent parents, as required by 45 C.F.R. §303.3(D);

h) maintain effective programs for timely establishing paternity and support obligations, as required by 45 C.F.R. §§303.4 and 303.5;

i) maintain programs for adequately reviewing whether child support obligations are set in appropriate amounts and for seeking modifications of support obligations, as required by C.F.R. §303.4(C);

j) take appropriate action pursuant to state law to enforce child support obligations that have become delinquent, as required by 45 C.F.R. §§305.26 and 303.6;

k) maintain sufficient staff, including attorneys, to adequately represent CSEA in court with respect to the establishment and enforcement of support orders, and to provide an effective program of child support services, as required by 45 C.F.R. §303.20(F).

144. Five counties still maintain Title IV-D contracts with the State.

145. Those agreements principally provide that the Office of the County Attorney will furnish specified Title IV-D services in both AFDC-linked and non-AFDC cases presented by custodial parents and their minor children residing in each such county.

146. In performing those tasks, county representatives are dependent on DCSE for such support and assistance as location of absent parents living outside Arizona and pursuit of enforcement or collection proceedings

against them, which requires the assistance of the Title IV-D agency in their state of residence insofar as DCSE can secure it, pursuant to interstate agreements or working arrangements.

147. Custodial parents and children served by county agencies therefore encounter many of the same delays and difficulties in receiving effective, mandated services, provided in conformity with Title IV-D and its implementing regulations, as do their counterparts for whom DCSE is the sole, direct provider of all such services.

VII CLAIM FOR RELIEF

148. Plaintiffs hereby incorporate and reallege, as though fully set forth herein, the allegations of paragraphs 4-147.

149. So long as it maintains an AFDC program, the state of Arizona must operate a child support enforcement program, as mandated by Title IV-A and IV-D of the Social Security Act.

150. Both the state plan for a child support enforcement program and its actual operation must comply with the requirements of Title IV-D and federal regulations formally implementing 42 U.S.C. §651 *et. seq.*

151. The statute and its implementing regulations specify, in considerable, concrete detail, the services that a state program must furnish and the performance standards they must satisfy.

152. Federal law further provides that the intended, ultimate beneficiaries of these mandated, closely regulated activities are custodial parents and their minor children, who have been deprived of the support legally owned them by absent parents.

153. The federal statutory and regulatory scheme thus obligates the state Title IV-D agency to provide specified services in prescribed fashion, even as their intended beneficiaries are entitled to such performances while enrolled in the program.

154. Congress has not affirmatively foreclosed enforcement by program beneficiaries of the corollary, individual rights thereby vested in them, which form the proper subject of an action authorized by 42 U.S.C. §1983:

a) Title IV-D omits any express or implied provision for alternative means of enforcement by program beneficiaries.

b) The enforcement authority granted HHS does not serve to foreclose resort by program beneficiaries to §1983 remedies, in that

i) they cannot require HHS to exercise it on their behalves, for any purpose; and

ii) if HHS does determine state violations of Title IV-D or its implementing regulations, the sole, substantive remedy open to it is a reduction in federal funding for AFDC benefit payments, a sanction that may redound to the detriment of many Title IV-D beneficiaries without at all ameliorating the plight of any denied legally sufficient support enforcement services.

155. Furthermore, as the history of Arizona's Title IV-D program aptly illustrates, HHS oversight otherwise culminates in preparation of corrective action plans that may not be implemented by the state nor monitored by the federal agency, thus serving only to create the appearance of reform without its substance.

156. As set forth in paragraphs 109-147, operation of the Arizona Title IV-D program does not now comply and, for the better of a decade, has not complied with detailed federal mandates on all core components, including identification and location of absent parents; establishment of paternity, as necessary; determination of support obligations; enforcement of corresponding judicial orders; and collection as well as disbursement of support.

157. Defendant Cowan has publicly and forthrightly admitted that the 1992 Performance Audit by the state Auditor General accurately sets forth substantial programmatic deficiencies and their primary causes – which constitute and perpetuate enduring, systemic violations of 42 U.S.C. §651 *et. seq.* as well as 45 C.F.R. Part 305.

158. The cognizable legal interests of plaintiffs and all other members of the proposed class are, of necessity, adversely affected by these institutional failures and shortcomings prohibited by federal law, which vests in them corollary, individual rights to all mandated services delivered in substantial compliance with Title IV-D and its implementing regulations.

159. Pursuant to 42 U.S.C. §1983, plaintiffs and the remainder of the class are, therefore, entitled to a declaratory judgment that DCSE operations violate the aforesaid,

substantive rights secured them by 42 U.S.C. §651 *et. seq.* and 45 C.F.R. Part 305 and to corresponding equitable relief.

WHEREFORE, plaintiffs respectfully request that this Court:

1. Assume jurisdiction over the subject matter of the instant action.

2. Certify the class proposed herein, pursuant to Fed. Rules of Civ. Pro., Rule 23(a) and (b)(2), the members consisting of the persons described in paragraph 78.

3. Enter a declaratory judgment determining that operation of the Arizona Title IV-D program violates controlling, substantive provisions of federal law creating rights in plaintiffs and the class enforceable through an action permitted by 42 U.S.C. §1983.

4. Grant permanent (and as necessary and appropriate, interlocutory) injunctions prohibiting continued adherence to the aforesaid pattern and practices and requiring affirmative measures sufficient to achieve as well as sustain substantial compliance with federal law, throughout all programmatic operations at issue.

5. Award plaintiffs their ordinary costs of suit and such extraordinary ones, including reasonable attorney's fees, as are authorized by 42 U.S.C. §1988.

6. Grant such other or further relief as the Court deems just and proper in the premises.

DATED this 22nd day of February, 1993.

By: /s/ William E. Morris
William E. Morris
Attorney for Plaintiffs

Supreme Court, U.S.
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(6)

No. 95-1441

In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

The overarching question – whether custodial parents seeking child support from noncustodial parents can sue state officials under 42 U.S.C. § 1983 to redress alleged violations of the Title IV-D child support program agreements between the States and the federal government – may be broken into the following subparts:

1. Whether Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669, which does not explicitly or implicitly provide for a private cause of action, nevertheless creates rights that are enforceable against state officials in a private cause of action pursuant to 42 U.S.C. § 1983.

2. Whether the Eleventh Amendment precludes a § 1983 cause of action against state officials to enforce the provisions of Title IV-D of the Social Security Act.

3. Whether *Maine v. Thiboutot*, 448 U.S. 1 (1980), which extended § 1983 to provide a remedy for violations of certain statutes not enacted pursuant to the Fourteenth Amendment, should be reconsidered in light of, among other things, the language and history of § 1983 itself, "clear statement" principles, and this Court's decisions concerning implied causes of action.

PARTIES TO THE PROCEEDING BELOW

Petitioner Linda J. Blessing, Director of the Arizona Department of Economic Security (the "State Director"), has succeeded Charles E. Cowan, who held that position during the proceedings below.

Respondents Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers, and Esperanza Laustaunau (the "Respondents") are proposed class representatives who filed the underlying action individually, on behalf of their minor children, and on behalf of all others similarly situated.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 68 F.3d 1141 (9th Cir. 1995). Pet. App. 1a-46a. The judgment of the United States District Court for the District of Arizona granting summary judgment in favor of the State Director is not reported. Pet. App. 1b-10b.

JURISDICTION

The court of appeals entered its judgment on October 12, 1995. The court of appeals denied a petition for rehearing and a suggestion for rehearing *en banc* on December 12, 1995. Pet. App. 1c-2c. The Petition for Writ of Certiorari was filed in this Court on March 8, 1996, and was granted on May 13, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

This matter involves the following provisions, the pertinent texts of which are reprinted as indicated: United States Constitution – Article I, § 8, cl. 1, Eleventh Amendment, and Fourteenth Amendment (Appendix A); federal statutes – 42 U.S.C. §§ 601-617 (Title IV-A) (Pet. App. D), 42 U.S.C. §§ 651-669 (Title IV-D) (Pet. App. D), 42 U.S.C. § 1983 (Appendix A); and federal regulations – 45 C.F.R. §§ 302.33, 305.20(a)(3), and 305.99 (Pet. App. E).[1]

STATEMENT OF THE CASE

This Court must decide whether the more than 18,000,000 custodial parents throughout the United States may sue state officials under 42 U.S.C. § 1983 to enforce federal laws governing the States' receipt of federal funds

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[1] All citations to the Code of Federal Regulations are to the 1995 edition.

to operate state child support enforcement programs pursuant to Title IV-D of the Social Security Act. Opening this floodgate of potential litigation against already overburdened state child support enforcement programs would necessarily divert operational attention and scarce public funding from delivery of services to litigation defense activities, thereby impairing the programs' abilities to perform the complex series of activities necessary to secure child support in each case and harming the very children that the programs were designed to help.

When Congress established Title IV-D's intricate statutory scheme, it recognized the difficulties posed by absent parents who are determined to avoid their responsibilities, the elaborate and interdependent tasks necessary to establish and enforce those responsibilities, the limited availability of public funding, and the enormous caseloads involved. Accordingly, Congress did not guarantee collection of child support. Instead, Congress dictated only that States, as a condition of receiving federal funds, comply "substantially" (defined as 75% of the time) with Title IV-D's provisions. Congress then vested in the Secretary of the United States Department of Health and Human Services (the "Secretary") both the exclusive authority to audit state programs for substantial compliance and the necessary discretion to suspend financial penalties to allow States an opportunity to reach substantial compliance without suffering funding reductions, which would hurt children.

As set forth below, the court of appeals erroneously attempted to engraft a private cause of action onto Title IV-D, in contravention of Congress' intent, this Court's precedents, and the Constitution.

A. Statutory Background

Title IV-A of the Social Security Act governs the federal welfare program known as Aid to Families with Dependent Children ("AFDC"). 42 U.S.C. §§ 601-617 (1985 & Supp. May 1996). A federal grant-in-aid program

that Congress created pursuant to its power under the Spending Clause, *see, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 11-17 (1981) ("*Pennhurst I*") (citing *King v. Smith*, 39 U.S. 309, 316 (1968)), Title IV-A establishes "a scheme of cooperative federalism" under which the federal government reimburses States for a portion of the funds that the States distribute to needy, dependent children and the adults who live with and care for them. *Bowen v. Gilliard*, 483 U.S. 587, 589 n.1 (1987). Families who are eligible for AFDC assistance receive monthly grants that are intended to make up the difference between their income and available resources and a standard of need that the State has deemed necessary to maintain a hypothetical family at a subsistence level. *Shea v. Vialpando*, 416 U.S. 251, 253-54 (1974).

In 1975, to complement Title IV-A, Congress enacted the Child Support Enforcement Act as Title IV-D of the Social Security Act. 42 U.S.C. §§ 651-669 (1985 & Supp. May 1996) ("Title IV-D"). Congress simultaneously amended Title IV-A to require that States, as a condition of receiving AFDC funds, adopt plans to provide child support collection services. 42 U.S.C. § 602(a)(27).

Congress enacted Title IV-D as a cooperative federal/state partnership for the public collection of private monies for child support. The purposes of Title IV-D include locating absent parents, establishing paternity, and obtaining and enforcing support obligations that absent parents owe to their families. 42 U.S.C. § 651. Title IV-D agencies provide these services, which are collectively referred to as "child support enforcement" activities, to all who apply, regardless of income level or welfare or nonwelfare status. *Id.*

Under this intergovernmental program, the participating States are responsible for providing almost all of the direct services, while the federal government oversees implementation and supplies two-thirds of the program's base funding. *See* 42 U.S.C. § 655(a)(2). In addition to establishing the provisions that States' child support enforcement plans must include to qualify for federal

funding, 42 U.S.C. § 654, Title IV-D sets forth duties that the Secretary must fulfill in monitoring the States' plans.

The Secretary must evaluate implementation of state child support enforcement plans and audit state child support enforcement programs to determine whether the programs are being operated in accordance with Title IV-D's requirements. 42 U.S.C. § 652(a)(4). The Secretary must audit all programs at least once every three years. *Id.* If the Secretary finds that a state program does not substantially comply with Title IV-D, she must impose penalties by ordering that the State's AFDC (as opposed to Title IV-D) funds be reduced in accordance with a statutorily prescribed formula. 42 U.S.C. § 603(h). The Secretary can suspend imposition of the penalty if the State adopts a corrective action plan that the Secretary approves to remedy the deficiencies. *Id.* The Secretary must audit at least every year the programs of States that have had their AFDC funds reduced for failing to substantially comply with Title IV-D's requirements or that are operating under a corrective action plan. 42 U.S.C. § 652(a)(4). The Secretary also can cut off funds completely from (1) a State that does not operate its AFDC program in accordance with Title IV-A's requirements (including the requirement of having a child support enforcement program that substantially complies with Title IV-D, 42 U.S.C. § 602(a)(27)), 42 U.S.C. § 604(a), and (2) a State whose State plan does not substantially comply with Title IV-D's requirements. 45 C.F.R. §§ 301.10, 304.20(b).

B. Proceedings Below

On February 22, 1993, Respondents filed a class action complaint in the United States District Court for the District of Arizona seeking only declaratory and injunctive relief against the State Director under 42 U.S.C. § 1983. J.A. 41. The five named Respondents represent a

proposed class of approximately 300,000 custodial parents in Arizona who have applied to receive child support enforcement services from the Arizona Department of Economic Security ("ADES") under Title IV-D.[2]

Respondents sought a declaration that (1) the operation of Arizona's child support enforcement program violated rights that Title IV-D and its implementing regulations created on their behalf, and (2) they could enforce these rights in a § 1983 action. *Id.* They also asked the court for a permanent injunction with continuing supervision of the State to ensure that ADES would achieve and sustain substantial compliance with Title IV-D.

The State Director filed a motion to dismiss, which the district court treated as a motion for summary judgment. Pet. App. 4b. The district court granted summary judgment in favor of the State Director, relying upon the reasoning in *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), which held that Congress had foreclosed private actions to enforce Title IV-D.

A divided panel of the court of appeals reversed the district court's decision. The majority presumed that § 1983 provides a private cause of action because it believed that Title IV-D creates enforceable rights and Congress has not explicitly or implicitly foreclosed § 1983 enforcement. Pet. App. 9a-10a. Judge Kleinfeld dissented, noting – among other things – that Title IV-D, like the statutory scheme at issue in *Suter v. Artist M.*, 503 U.S. 347 (1992), did not unambiguously confer enforceable rights upon the Respondents, Pet. App. at 39a, and that

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[2] The Complaint alleged in 1993 that approximately 275,000 Title IV-D cases existed. J.A. 19. The Secretary's published figures for 1994 (the latest available figures) put the number at 307,060 open case files. *See U.S. Department of Health and Human Services, Child Support Enforcement Nineteenth Annual Report to Congress*, 41-49 (1995). The number fluctuates constantly as ADES closes existing cases and new custodial parents request services.

the majority's shift of Title IV-D enforcement from the Secretary to federal judges was contrary to Congress' intent. *Id.* at 37a-38a.

SUMMARY OF ARGUMENT

The question of which federal statutory and regulatory "rights" properly can be enforced against the States through 42 U.S.C. § 1983 poses profound issues concerning separation of powers and the proper relationship between federal courts and state institutions. By authorizing private individuals to sue the State Director to enforce a federal-state cooperative agreement that contains no express private cause of action, the court below exercised functions that are uniquely congressional in nature. This usurpation of legislative authority is doubly questionable because Title IV-D involves Spending Clause legislation, in which the "clear statement" principle counseling judicial restraint is strongest. Yet the court of appeals acted without any authority from the legislative branch. Moreover, by enforcing federally adopted standards through its broad equitable powers, the federal court below assumed responsibility for managing significant state executive and legislative functions. It is against this backdrop – involving some of the most basic issues concerning the proper structure of our constitutional system – that the Court should decide whether § 1983 properly authorizes the lawsuit here, and more fundamentally, whether the Court should reconsider if § 1983 can support the extraordinary authority federal courts have exercised since *Maine v. Thiboutot*, 448 U.S. 1 (1980).

1. Under the Court's current test and most recent pronouncement, *see Suter*, 503 U.S. at 355-57, § 1983 cannot be used to enforce the Spending Clause legislation of Title IV-D.

a. The "legitimacy" of Congress' power to legislate pursuant to the Spending Clause "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' " that the States and the federal government

enter into in Spending Clause programs. *Pennhurst I*, 451 U.S. at 17. This Court has insisted that Congress impose all conditions upon Spending Clause grants "unambiguously" and with a "clear voice" in order for "States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.*; *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Here, Congress did not unambiguously notify States that their acceptance of federal AFDC funds would expose them to § 1983 liability (including attendant attorney's fees under 42 U.S.C. § 1988).

Moreover, Title IV-D does not unambiguously create the binding obligations to, or "rights" for, any individual Respondent that a § 1983 action requires because Title IV-D is satisfied by State compliance in only 75% of the cases. 42 U.S.C. § 652(g)(1)(A); *see also* 45 C.F.R. § 305.20(a)(3). Congress also provided elaborate financial incentives to encourage States to secure support, and both logic and precedent indicate that such incentives are inconsistent with an interpretation that Congress intended to impose binding obligations. *Pennhurst I*, 451 U.S. at 17-18.

b. Indeed, Title IV-D's provisions are so nonbinding, and the benefits to any individual Respondent are so vague, amorphous, and speculative, that *no* Respondent can establish the causation or redressability necessary for Article III standing, much less any statutory "right." *See, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614, 616-19 (1973). The cause of any Respondent's failure to receive support is not the State, but rather the absent parent who is not paying the support. Moreover, Title IV-D does *not* compel the State to actually secure support from any such absent parent on behalf of any individual Respondent. Section 1983 should not be construed to create a private cause of action for Respondents who lack standing to pursue it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62, 576-78 (1992); *cf. Lewis v. Casey*, 64 U.S.L.W. 4587, 4588 (U.S. June 24, 1996).

c. Title IV-D's administrative enforcement scheme precludes judicial recognition of a § 1983 cause of action. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15, 20 (1981). The Secretary's frequent and rigorous audits under Title IV-D, along with the availability of financial penalties and funding cutoffs at the Secretary's discretion, demonstrate comprehensiveness that precludes the judicial recognition of supplemental remedies under § 1983.

2. The Eleventh Amendment also bars Respondent's suit. First, Arizona has not unequivocally waived its sovereign immunity in this case. Second, Congress has not unequivocally expressed its intent to abrogate participating States' sovereign immunity, nor *could* it do so because Title IV-D is Spending Clause legislation that was *not* enacted pursuant to Congress' power under the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1123, 1125 (1996). Respondents cannot avoid this Eleventh Amendment bar by nominally seeking declaratory and injunctive relief against the State Director alone. The statutory enforcement scheme that Congress provided for Title IV-D stops far short of authorizing broad private actions for declaratory and injunctive relief. *See id.* at 1132-33.

3. This Court should reconsider *Maine v. Thiboutot*, 448 U.S. 1 (1980), and modify its holding. First, pursuant to the clear statement principles that federalism requires in interpreting § 1983, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989), but which *Thiboutot* ignored, a law can create a "right" enforceable under § 1983 only if it creates "[a] legally enforceable *claim of one person against another.*" *Dennis v. Higgins*, 498 U.S. 439, 447 n.7 (1991) (emphasis added) (citation omitted). Thus, federalism demands, at a minimum, that to establish a "right" against a State under § 1983 based on a statutory violation, a plaintiff should have to show at least what he or she would have to show to sue a private person: an express or implied cause of action under the underlying

statute. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 525-26 (1990) (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting).

Second, § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(a)(3), should be construed *in pari materia*. Such an interpretation, which the circumstances and history of § 1983 strongly support, would limit § 1983 actions seeking statutory enforcement to actions to enforce statutes "providing for equal rights." *Id.* It would also bring § 1983 into harmony with *Seminole Tribe*, which holds that Congress must act pursuant to the Thirteenth, Fourteenth, or Fifteenth Amendments (or a later Amendment) to abrogate a State's Eleventh Amendment immunity. 116 S.Ct. at 1128. Title IV-D is Spending Clause legislation, and the spending power is, of course, contained in the *pre*-Eleventh Amendment Constitution. By allowing § 1983 to enforce alleged rights that are not derived from the Fourteenth Amendment, the court below authorized Congress to do indirectly that which it unquestionably could not do directly under *Seminole Tribe*: expose the States to federal court litigation and damages actions brought by citizens to enforce noncivil rights.

Stare decisis should not bar these necessary modifications of *Thiboutot*. Not only is *Thiboutot* inconsistent with later authority, as well as with fundamental federalism and separation of powers principles, but also the speculative, case-by-case analysis it requires has created an unworkable and ever-expanding judicial quagmire.

Accordingly, this Court should reverse the decision of the court of appeals and order that Respondents' suit be dismissed.

ARGUMENT

This case, concerning whether Title IV-D can be enforced privately against State officials under 42 U.S.C. § 1983, tests the delicate balance of power not only

between the federal government and the States, but also among the coequal branches of the federal government. Each expansion of liability under § 1983 chips away at the pedestal of federalism that undergirds our constitutional structure. Moreover, when such expansion occurs because a federal court has elected to speculate about congressional intent in the face of Congress' failure – whether deliberate or inadvertent – to express its intent clearly, the constitutional principle of separation of powers that limits federal judicial power is weakened, and the distinct lines between the executive, legislative, and judicial functions blur.

Title IV-D authorizes a cooperative agreement between the federal government and participating States. Respondents seek to enforce judicially Title IV-D's numerous provisions and those of the regulations adopted thereunder directly against the State Director by means of § 1983. Principles of federalism and separation of powers, however, counsel against such an expansive interpretation of § 1983 in this case.

Federalism concerns are especially heightened where, as with Title IV-D, Congress acts pursuant to its spending power. As is the case with other federal-state cooperative programs, States choose whether to participate in the AFDC program; if they elect to participate, they agree to comply with all of the terms and conditions placed on the grant of federal funds. One of Title IV-D's terms requires participating States to operate a child support enforcement program. As with all cooperative programs, States still have some latitude to run their Title IV-D programs as they see fit. By replacing State discretion with ongoing federal judicial oversight through the expanded use of § 1983, federal courts have abrogated the States' ability to control their own resources, to the detriment of the very people and goals that these programs were intended to serve. *See Thiboutot*, 448 U.S. at 23-25 (Powell, J., dissenting); *cf. Missouri v. Jenkins*, 115 S. Ct. 2038, 2054 (1995).

Judicial use of § 1983 to enforce any and all federal statutory rights has produced a realm of "quasi-implied" causes of action against state officials. Section 1983 creates no rights itself; it merely enforces rights created elsewhere. In the aftermath of the expansive reading that the *Thiboutot* majority gave the word "laws" in § 1983, courts have examined federal statutes on a case-by-case basis and have speculated as to whether Congress intended each statute to create a "right" for which § 1983 provides a cause of action. This judicial undertaking relieves Congress of its constitutional obligation to make the difficult political choice as to whether to allow a private cause of action. Private causes of action carry significant costs and potential benefits; weighing the relevant interests in devising a proper method of enforcement is a quintessentially legislative process. Providing such a remedy without clear evidence of Congress' intent usurps that legislative role in derogation of basic principles of separation of powers. Judicial addition of a § 1983 remedy that permits private individuals to sue States and allows federal judges to oversee State IV-D programs thus subverts the federal-state contract in violation of Spending Clause, separation of powers, and federalism principles.

I. TITLE IV-D DOES NOT CREATE RIGHTS ENFORCEABLE BY PRIVATE PARTIES IN AN ACTION UNDER § 1983.

Section 1983 "by itself does not protect anyone against anything," or "provide any substantive rights at all." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979). Rather, § 1983 merely provides a vehicle for enforcing rights that other substantive laws and the Constitution explicitly create. *See Maher v. Gagne*, 448 U.S. 122, 129 n.11 (1980). Respondents' sole claim is that Title IV-D's funding provisions create rights *in them* that they

can enforce against State officers in a § 1983 action.[3] However, it is undisputed that Title IV-D creates no *express* cause of action on Respondents' behalf. Because Congress did not intend to permit private parties to enforce Title IV-D's prescriptions via § 1983, it did not provide the unambiguous notice necessary to bind the States. Therefore, Respondents' argument fails under this Court's precedents that establish the framework for analyzing the type of action that Respondents press here.

Under the existing framework, a plaintiff may not bring suit under § 1983 if "(1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' " *Wilder*, 496 U.S. at 508 (quoting *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987)); *Suter*, 503 U.S. at 355-56. Application of this framework to Title IV-D demonstrates that a § 1983 action should not be available to Respondents.

A. Title IV-D Does Not Create Enforceable Rights.

"Section 1983 speaks in terms of '*rights*, privileges, or immunities,' not violations of federal law." *Wilder*, 496 U.S. at 509 (emphasis in original) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)). Thus, the first critical question is whether Congress "*unambiguously* confer[red]" upon Respondents a right to enforce Title IV-D's provisions. *Suter*, 503 U.S. at 357 (emphasis added). To establish that Congress has done so, Respondents must show that (1) Title IV-D was "intend[ed] to benefit" them; (2) Title IV-D imposes "binding obligation[s]" on the States; and (3) the interests

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[3] Respondents correctly have made no attempt to argue that there is an implied cause of action under Title IV-D itself under the test of *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny. *See also* Pet. Reply at 6 n.2.

that Respondents assert are not so " 'vague and amorphous' " that they are " 'beyond the competence of the judiciary to enforce.' " *Wilder*, 496 U.S. at 509 (quoting *Golden State*, 493 U.S. at 106) (other citations omitted). Even if it is assumed that Respondents are among the Act's intended beneficiaries, Respondents cannot satisfy the remainder of this Court's prerequisites.

1. Title IV-D does not impose any " 'binding obligation' on the States that gives rise to enforceable rights." *Wilder*, 496 U.S. at 510. Although Title IV-D does require certain actions of participating States, the Court "must examine exactly *what* is required of States by the Act," taking "pains to analyze the statutory provisions in detail, in light of the *entire* legislative enactment, to determine whether the language in question created 'enforceable rights, privileges, or immunities within the meaning of § 1983.' " *Suter*, 503 U.S. at 357-58 (emphasis added) (quoting *Wright*, 479 U.S. at 423); *see also Pennhurst I*, 451 U.S. at 19 (examining specific section "in the context of other more specific provisions of the Act"). Thus, the Court's examination of the relevant provisions of the Medicaid Act in *Wilder* revealed a "binding obligation" that a participating State actually "adopt reasonable and adequate" reimbursement *rates* for health care providers, not simply assure the Secretary that it had found its rates to be "reasonable and adequate." 496 U.S. at 512-15. Similarly, the Court found in *Wright* that the Brooke Amendment to the Housing Act's requirement that low-income families "shall pay as rent" no more than 30% of their income "could not be clearer" and that it created a right that low-income families could enforce. 479 U.S. at 419-20, 430. Indeed, both cases involved requirements measurable in hard dollars.

Suter, by contrast, involved the provision of general services under § 671(a)(15) of the Adoption Assistance and Child Welfare Act, which merely required States to make "reasonable efforts" (1) to prevent or eliminate the need to remove a child from his or her home and (2) to return the child to his or her home. The Court found that

the "reasonable efforts" requirement was not definitive enough to create an enforceable right because the manner in which "the State was to comply with this directive . . . was, within broad limits, left up to the State."[4] *Suter*, 503 U.S. at 360.

Title IV-D's requirements for services are more like those at issue in *Suter* than like the measurable dollars at issue in *Wright* or *Wilder*. Title IV-D requires only "substantial compliance" with its requirements. 42 U.S.C. § 602(a)(27). The relevant statutory sections and regulations define "substantial compliance" as compliance in at least 75% of the cases reviewed. 42 U.S.C. § 652(g)(1)(A); *see also* 45 C.F.R. § 305.20.[5] In other words, neither the

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[4] In 1994, Congress enacted 42 U.S.C. § 1320a-2, Pub. L. No. 103-382, § 555(a), 108 Stat. 3518, 4057-58, in response to this Court's decision in *Suter*. *See* Pet. 12 n.7. The amendment provides in part that it is "not intended to limit or expand the grounds for determining the availability of private actions [under the Social Security Act] to enforce State plan requirements other than by overturning any such grounds applied in *Suter* . . . but not applied in prior Supreme Court decisions respecting such enforceability." Congress, however, gave no hint what it thought the "grounds" of *Suter* were, or what "grounds" existed pre-*Suter*.

The court below indicated that "*Suter* represents an elaboration and amplification of the *Wilder* test rather than an unannounced and unacknowledged departure." Pet. App. 13a-14a. Thus, Petitioner believes that *Suter* is still good law for the propositions and rationale upon which Petitioner relies. For further discussion of the *Suter* amendment, *see infra* p. 48.

[5] To the extent that the court of appeals relied upon the Secretary's regulations to support the creation of enforceable rights (see Pet. App. 15a-18a), its reliance implicates separation of powers concerns. *See Wright*, 479 U.S. at 438 (O'Connor, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ., dissenting) ("I am concerned . . . that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within

statute nor the regulations require participating States to actually "secure support" or "establish paternity" for any particular applicant. That States are not required to be in compliance with respect to *all* cases manifests Congress' desire that the States exercise discretion with respect to actions taken in individual cases. Indeed, Respondents can point to no requirement that would assure them individually of enhanced child support recovery or establishment of paternity. *See* Pet. App. 37a ("[t]he law at issue says, in substance, that states are supposed to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough") (Kleinfeld, J., dissenting).

That Congress did not intend Title IV-D to impose binding, individually enforceable obligations is further evidenced by the elaborate financial incentive program (involving up to millions of additional dollars a year for individual States) that Congress created to encourage States to secure support. 42 U.S.C. § 658. Congress would not have needed to adopt such incentives if it had already ordered complete compliance. *See Pennhurst I*, 451 U.S. at 18 ("[s]urely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States"). Like the statute at issue in *Pennhurst I* (*see id.* at 20-21), Title IV-D reflects Congress' focus on *assisting* States in operating and funding child support programs, not on creating rights. *See* S. Rep. No. 1356, 93d Cong., 2d Sess. 46-48 (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8150 (the federal government's role is "[t]o assist and oversee the operations of State child support programs").

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the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result. . . . Such a result, where determination of § 1983 'rights' has been unleashed from any connection to congressional intent, is troubling indeed") (emphasis in original).

Respondents cannot establish that Congress intended to confer an enforceable right upon them, let alone assemble enough evidence to demonstrate that Congress expressed such an intent *unambiguously*. *Suter*, 503 U.S. at 357; *Pennhurst I*, 451 U.S. at 17 ("if Congress intends to impose a condition on the grant of federal moneys, it must do so *unambiguously*") (emphasis added). Congress notified participating States only that their grants were conditioned upon performing their duties to the Secretary's satisfaction, not that they would also be answerable to private litigants and federal judges. *See Suter*, 503 U.S. at 363. Such a change is clearly material to a State's decision whether to participate.

2. The "rights" that Respondents assert are "too vague and amorphous" to be judicially enforceable. *Wilder*, 496 U.S. at 509. This is so for three reasons. First, as already discussed, because the State is obligated to apply the designated procedures in only 75% of the cases, a court could not mandate that any action be taken on behalf of a particular Respondent. Second, the State Director did not cause Respondents' true injury; the absent parents' failure (or inability) to take responsibility for their children is the real cause of the injury. Third, the injury is not redressable in a suit against the State Director. Thus, Respondents have no Article III standing, much less any unambiguous statutory rights.[6]

Respondents' position is akin to that of the plaintiff in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). There, a custodial parent not receiving child support payments sued Texas alleging that its discriminatory application of the criminal nonsupport statute exempted her child's father from prosecution. This Court observed that plaintiff lacked standing because she had "made no showing

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[6] The State Director's point is not that the individual Respondents in this particular case lack standing, but instead that *no one* seeking Title IV-D assistance could satisfy Article III, making it inconceivable that Congress intended to allow Respondents privately to enforce Title IV-D's provisions.

that her failure to secure support payments result[ed] from the nonenforcement, *as to her child's father*, of [the statute]." *Id.* at 618 (emphasis added). A lack of causation, *a fortiori*, follows in the instant case. If, for purposes of standing, child support payments are not directly linked to the criminal laws intended to enforce them, then they certainly cannot be directly linked to Title IV-D, the provisions of which are less severe and more easily evaded. *See* American Public Welfare Association Amicus Brief ("APWA") at 4 nn.2-3, 15-16. The direct cause of Respondents' failure to receive unpaid child support is the absent parent, not the State Director.

Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), plaintiffs alleged that an IRS Ruling granting a hospital favorable tax treatment encouraged the hospital's policy of not treating indigents. This Court, however, found it "purely speculative whether the denials of service . . . fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. Here, again, Arizona is not "encouraging" the absent parents' unlawful conduct, but, to the contrary, is expending tremendous resources to *secure* relief from that conduct. As in *Simon*, the real injury stems from personal decisions that the absent parents have made, quite apart from anything that the State does.

In addition to a lack of causation between the State Director's past conduct and Respondents' alleged injury, the prospect that granting Respondents the relief that they seek – substantial compliance with IV-D's provisions – "will, at least in the future, result in payment of support can, at best, be termed only speculative." *See Linda R.S.*, 410 U.S. at 618; *see also Allen v. Wright*, 468 U.S. 737, 758-59 (1984) ("it is entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"). To establish that the requested relief against the State Director will redress their injuries, Respondents must demonstrate

that there is a "substantial likelihood" that the third parties involved will change their behavior to benefit Respondents if the relief is granted.[7] *Simon*, 426 U.S. at 45. This Court's statement in *Lujan* is particularly apt with respect to the problem of third parties and redressability:

> When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. . . . [S]tanding is not precluded, but it is ordinarily *substantially more difficult* to establish.

504 U.S. at 562 (internal quotation marks and citations omitted) (emphasis added).

Redressability is not a matter of alleging that the State could be doing something more to help the Respondents, but rather of alleging that the action demanded of the State Director would be sufficient to correct the behavior of absent parents and other entities, including private employers and other governmental jurisdictions. Respondents cannot meet this burden because granting them the relief that they request will not necessarily

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[7] Success in Title IV-D cases depends upon more than the absent parents' willingness to accept responsibility for their children. It often also depends upon the cooperation of entities in the executive and judicial branches and the private sector. *See* APWA at 8. In some cases, the entities upon whom success depends are entities (including Title IV-D agencies) that are located in other States. *See id.* at 12 (reporting that although interstate cases make up 30% of the national caseload, collections in such cases make up only 8% of the national total). Title IV-D agencies have little or no control over any of these outside entities, and none of the entities is before the courts in the instant case.

remedy their true injuries – the absent parents' refusal (or inability) to fulfill their responsibility to their children.

One need look no further than the resourcefulness that the absent parents in this case have displayed in evading the State's enforcement efforts. *See* Pet. App. 5a-6a (fathers changed jobs to avoid meeting their child support obligations). The problem is not unique to Arizona; despite the 75% substantial compliance standard for provision of services, the actual child support collection rate nationally is only 18%. *See* APWA at 5. The chasm between the efforts and the results is frustrating, not only to Respondents, but also to the State Director and to other States. Respondents, however, must demonstrate something more than frustration at the government's inability to produce better overall results. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

If Respondents want to increase the amount of resources devoted to child support enforcement and to reorder the priorities of Title IV-D, they have a more appropriate forum than the courts. Indeed, as this Court again recognized just last Term,

> [i]t is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.

Lewis, 64 U.S.L.W. at 4533. Congress specifically delegated responsibility for enforcing Title IV-D's provisions to the Secretary, not to the courts.

B. Title IV-D's Comprehensive Enforcement Scheme Precludes Use of § 1983.

Respondents would not be able to sue under § 1983 even if Title IV-D did create enforceable rights, because "the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.' " *Wilder*, 496 U.S. at 521 (quoting *Sea Clammers*, 453 U.S. at 20).

The comprehensive remedial scheme that Congress crafted in Title IV-D includes an elaborate auditing operation and a unique financial penalties system and vests enforcement authority in the Secretary alone. Neither Congress' elaborate statutory scheme, 42 U.S.C. §§ 651-669, nor the Secretary's even more detailed regulations, 45 C.F.R. §§ 301-307, contains a provision for federal court supervision of the States. "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Sea Clammers*, 453 U.S. at 15; *see also Seminole Tribe*, 116 S. Ct. at 1132-33.

1. Congress created an elaborate auditing operation to enforce substantial compliance by the States. For example, Congress designed a specific enforcement unit, the Office of Child Support Enforcement ("OCSE"), and placed it under the direction of the Secretary. 42 U.S.C. § 652(a)(1)-(10). Through the OCSE, the Secretary exercises her power to audit State programs to ensure "substantial compliance" with Title IV-D's requirements and to reduce federal funding to any State that is not in "substantial compliance." 42 U.S.C. § 652(a)(4). The Title IV-D audit provisions are substantially more rigorous than the audit and cutoff provisions that the Court in *Wright* and *Wilder* found insufficient to preclude the availability of a § 1983 action.[8] First, Title IV-D mandates

[8] *See Wright*, 496 U.S. at 428; *Wilder*, 496 U.S. at 522.

triennial audits of programs that are in substantial compliance and annual audits of programs that are operating under a corrective action plan. 45 C.F.R. § 305.10(b). In contrast, under the provision at issue in *Wright*, audits only occurred every eight years. 479 U.S. at 428. Second, the audits under Title IV-D are much more substantive and comprehensive than the audit found lacking in *Wilder*, pursuant to which a State merely made assurances to the Secretary that its rates were "reasonable and adequate," without providing the data underlying its assurances. 496 U.S. at 507-08.

2. Congress also developed a unique system of financial penalties that demonstrates beyond a doubt that Congress considered private enforcement actions inappropriate. First, the system assesses the penalties for noncompliance with the "substantial compliance" standard against the Title IV-A program rather than against the Title IV-D program. (Any § 1983 liability, in contrast, will attach to a State's Title IV-D program, thereby hurting that program in further contravention of Congress' manifest intent.) Second, the financial sanctions can range from funding reductions, 42 U.S.C. § 603(h), to complete cut off of funding for Title IV-A, 42 U.S.C. § 604(a), and Title IV-D, 45 C.F.R. §§ 301.10, 304.20(h). Third, Congress – knowing that child support enforcement caseworkers face daunting tasks – gave the Secretary broad discretion to postpone imposition of any financial penalties to allow States to work their way into compliance.[9]

Indeed, Title IV-D caseworkers typically handle caseloads that would make Sisyphus' lot seem an enviable one. Sisyphus was condemned to roll only one boulder uphill endlessly. Title IV-D caseworkers, with their enormous caseloads and with each case involving countless tasks, must attempt to roll hundreds of boulders uphill simultaneously. *See* APWA at 5-9 (describing intricacy of

[9] The penalties provision is not a "dead letter," however, because the Secretary has issued sanctions against States. *See* APWA at 25-26.

tasks and large caseloads). The Secretary annually submits detailed reports to Congress concerning these incredible responsibilities. It simply defies logic to assume that Congress intended § 1983 liability to attach in these circumstances.

Furthermore, the existence of a statutory private cause of action is not a prerequisite for precluding § 1983 liability. Such private remedies were available in two cases in which this Court found a § 1983 remedy precluded. *See Sea Clammers*, 453 U.S. at 13; *Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984). However, the Court did not base its holdings in those cases on that fact alone. Moreover, in finding that the statutes at issue in *Wright* and *Wilder* did not contain a comprehensive enforcement scheme, this Court relied upon specific legislative statements and administrative actions which indicated that Congress had anticipated that private rights of action would be available. *See Wright*, 479 U.S. at 424-25 ("there have also been both congressional and agency actions indicating that enforcement authority is not centralized and that private actions were anticipated"); *Wilder*, 496 U.S. at 516 ("it is clear that prior to the passage of the Boren Amendment, Congress intended that health care providers be able to sue in federal court"). Respondents can point to no such statements or actions here.

At best, Respondents' suit would be duplicative of Congress' carefully articulated scheme; at worst, it would do serious damage to that scheme. To the extent that Respondents seek "substantial compliance" with Title IV-D's requirements, they mirror the Secretary's mandate. Thus, any action that a court took would merely duplicate what the Secretary was already doing and would be taken without the benefit of the Secretary's special expertise. To the extent that Respondents seek something more than "substantial compliance" with the Act, or that a court's view of "substantial compliance" differs from that of the Secretary, any relief that Respondents obtained in federal court would be inconsistent with supervision by the Secretary, the only person in whom Congress

expressly placed its trust to ensure State compliance. 42 U.S.C. § 652. The conclusion is inescapable that Congress did not intend to allow private actions because such actions pose a significant risk of harm to the enforcement scheme that Congress adopted.

II. THE ELEVENTH AMENDMENT BARS ANY ACTION AGAINST THE STATE OR THE STATE DIRECTOR TO ENFORCE TITLE IV-D.

Even if this Court resolves in favor of Respondents the statutory question whether Title IV-D creates rights that private parties can enforce through § 1983, the constitutional question whether the Eleventh Amendment bars Respondents' suit still remains.[10] It is well settled that Congress did not intend "by the general language of § 1983 to override the traditional sovereign immunity of the States." *Quern v. Jordan*, 440 U.S. 332, 341 (1979). Although this Court has yet to explore at length the Eleventh Amendment's impact on *Thiboutot*-type suits,[11]

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[10] Under Eleventh Amendment jurisprudence, "each State is a sovereign entity in our federal system" and " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' " *Seminole Tribe*, 116 S. Ct. at 1122 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (other citations omitted)).

[11] The Eleventh Amendment was not an issue in *Thiboutot* itself because the plaintiffs there brought their suit in state court. *See Thiboutot*, 448 U.S. at 2, 9 n.7. Eleventh Amendment issues were presented in the petition for *certiorari* in *Sea Clammers*, but they were not "within the scope of the questions on which review was granted" and thus the Court did not consider them. *Sea Clammers*, 453 U.S. at 8 n.12. It appears that the state officials in *Wilder* raised an Eleventh Amendment defense in the lower courts, but not before this Court. *Wilder*, 496 U.S. at 504 n.4. The *Wilder* majority's only other discussion of the Eleventh Amendment concerned Congress' earlier attempts to require States to waive their Eleventh Amendment immunity in the context of the Medicaid Act. *Id.* at 516-18. The

it is clear that the Amendment's guarantee of sovereign immunity – and the principle of federalism it embodies – precludes Respondents' action.

The Eleventh Amendment bars any action against the State of Arizona or ADES, a state agency. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984) ("*Pennhurst II*"); *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149-50 (1981) (per curiam). Any waiver by the State of its Eleventh Amendment immunity would have to be "unequivocal," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985), and be accomplished "by the most express language." *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 473 (1987) (plurality opinion) (internal quotations omitted). Arizona has not made an explicit waiver with respect to Title IV-D, and it has not constructively waived its sovereign immunity merely by accepting federal funds. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("[t]he mere fact that a State participates in a program through which the Federal Government provides assistance . . . is not sufficient to establish consent on the part of the State to be sued in the federal courts"); *see also id.* at 674 (finding no waiver of immunity in the Social Security Act); *Jenkins v. Massinga*, 592 F. Supp. 480, 493-494 & n.12 (D. Md. 1984) (finding no waiver of immunity in Title IV-D).

Respondents apparently seek to avoid the Eleventh Amendment's preclusive effect by bringing this action for declaratory and injunctive relief against the State Director in her official capacity, as in *Ex parte Young*, 209 U.S. 123 (1908). This claim must fail as well, however, because (1) the purported claim against the State Director is in reality

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Court did not pass on whether Congress' belief in the necessity of a waiver was correct. The majority opinions in *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), *Suter*, *Wright*, *Golden State*, *Smith*, and *Pennhurst I* make no mention of the Eleventh Amendment at all.

a poorly disguised claim against the State itself; (2) Congress did not clearly intend to include a private right of action for declaratory and injunctive relief in the remedial scheme it designed for Title IV-D; and (3) Title IV-D imposes duties upon contracting States and their agencies only, rather than upon individuals.

1. When suits are filed in federal courts against State officers acting in their official capacities, this Court has insisted that "the essential nature and effect of the proceeding" be determined because it is well-established that the Eleventh Amendment bars a suit against State officers when "the state is the real, substantial party in interest" and the officer is being sued merely as a representative of the State. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 463-64 (1945); *Pennhurst II*, 465 U.S. at 89. Here, Respondents sued the State Director only in her "official capacity" and sought a permanent injunction that she take "affirmative measures sufficient to achieve as well as sustain substantial compliance with federal law, throughout all programmatic operations at issue." J.A. 42.

Obviously, the State Director cannot single-handedly increase her agency's budget to hire more caseworkers, shift resources from other equally needy and important State programs, or opt out of the federal AFDC and Title IV-D programs. More important (and more distressing) is that the court of appeals openly recognized the true scope of the pleading against the State Director when the court threatened that "the contempt power of the court, as well as other traditional equitable remedies, is likely to be more successful in inducing compliance on the part of state officials, and where necessary, state legislators." Pet. App. 29a. The Complaint did not name any other state officials or any state legislators, yet the court of appeals asserted that it could reach them through this action that is nominally against only the State Director.

Under the Eleventh Amendment, the "principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III." *Pennhurst*

II, 465 U.S. at 98; *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993); *Kentucky v. Graham*, 473 U.S. 159 (1985). Federal courts must therefore dismiss suits in which States that have not waived their sovereign immunity are the real parties in interest, regardless of who the named defendants in such suits are. To hold otherwise would be to cause a result that "destroys the logic of the Framers' careful allocation of responsibility among the state and federal judiciaries, and to make nonsense of the effort embodied in the Eleventh Amendment to preserve the doctrine of sovereign immunity." *Nevada v. Hall*, 440 U.S. 410, 441 (1979) (Rehnquist, J., dissenting).

2. The principles in *Seminole Tribe* bar a § 1983 action in this case. In *Seminole Tribe*, plaintiff alleged that Florida's governor was committing a "continuing violation of federal law" by failing "to bring the State into compliance" with 25 U.S.C. § 2710(d)(3) of the Indian Gaming Regulatory Act (IGRA). 116 S. Ct. at 1132. As here, the plaintiff sought no monetary relief, but rather sought to mandate the governor's future compliance with the IGRA. This Court rebuffed the plaintiff's attempt to sue the state official, citing the Eleventh Amendment and the IGRA's structure.

"[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.* Here, Congress prescribed a detailed carrot-and-stick approach to elicit state compliance with Title IV-D's requirements. Title IV-D provides for financial incentive payments to States that meet certain performance standards (42 U.S.C. § 658; *see also* 45 C.F.R. § 304.12), coupled with a comprehensive audit of each State's child support enforcement program – with the potential penalty of reduced federal funding – to ensure that States achieve certain minimum results. *See* 42 U.S.C. §§ 652(a)(4),

603(h); *see also* 45 C.F.R. § 305, and *supra* pp. 20-23 (describing remedial scheme).

Even if (contrary to Petitioner's argument in Part I.B.) Title IV-D's remedial scheme is not "comprehensive" enough to establish congressional intent to preclude § 1983 enforcement, it is still sufficient to preclude a private action for declaratory and injunctive relief. Indeed, this Court specifically found in *Seminole Tribe* that the "remedial scheme" that Congress specified in the IGRA was quite "limited." 116 S. Ct. at 1132-33. The Court nevertheless drew an inference from Congress' "quite *modest* set of sanctions" that "Congress intended therein not only to define, but also significantly to limit, the duty imposed by" the IGRA. *Id.* (emphasis added).

As in *Seminole Tribe*, Congress has prescribed a remedial scheme with respect to Title IV-D that is concededly less rigorous than the one to which the State Director would be exposed if she were subject to the "full remedial powers of a federal court" in a § 1983 action. *See Seminole Tribe*, 116 S. Ct. at 1133. Indeed, as previously noted, the court below was keenly aware of the coercive effect its Article III powers could have not only over the State Director, but also over the entire State. *See* Pet. App. 29a. The court of appeals, however, turned Congress' intent and the Eleventh Amendment completely on their heads. *See Seminole Tribe*, 116 S. Ct. at 1133 ("the fact that Congress chose to impose upon the State a liability which is *significantly more limited* than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that *Congress had no wish to create the latter*" under Title IV-D) (emphases added); *see also Sea Clammers*, 453 U.S. at 15 ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"). In sum, when dealing with statutory rights, courts must defer to the remedial scheme that Congress has actually enacted and must accept that any remedial scheme that is less demanding

than an *Ex parte Young* action represents a deliberate choice by Congress.

3. In *Seminole Tribe*, this Court noted that the IGRA imposed its requirements exclusively upon "the State," but never upon its officers, and cited this as additional support for its conclusion that Congress did not intend to make an *Ex parte Young* action available. *Seminole Tribe*, 116 S. Ct. at 1133 n.17. The same is true here. Title IV-D speaks exclusively in terms of "the State"[12] or "State agencies."[13] By explicitly and exclusively referring to "the States" or "State agencies" rather than to individual State officers,[14] *see id.* (providing examples where Congress has specifically referred to State officials), Congress expressed its intent that a suit against State officers, even for declaratory and injunctive relief, would not be available. *Id.*; *see also Pennhurst II*, 465 U.S. at 101 ("[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest' ") (citations omitted). At the very least, the statute's ambiguity as to whether Congress intended that a remedy for declaratory and injunctive relief be available requires that such an action not be permitted. *See Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) ("where statutory intent is ambiguous," courts should "not attribute to Congress an intent to intrude on state governmental functions").

In essence, the principle employed in *Seminole Tribe* counsels courts to exercise restraint when identifying *any* remedy against a State or state officer beyond that which Congress has explicitly provided.[15] Such restraint is

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[12] *See, e.g.*, § 654(4) ("[a] *State* plan . . . must . . . provide that such *State* will undertake" to establish paternity and secure enforcement) (emphasis added); § 657(b) ("[t]he amounts collected as support by a *State* pursuant to a plan approved under this part . . . shall . . . be distributed as follows . . . ") (emphasis added); § 666(a) ("each *State* must have in effect laws requiring the use of the following procedures . . . ") (emphasis added); § 667(a) ("[e]ach *State* . . . must establish guidelines for child support award amounts within the State") (emphasis added); § 667(c) ("each *State* shall furnish the Secretary with copies of its guidelines") (emphasis added).

[13] *See, e.g.*, 42 U.S.C. § 652(f) ("[t]he Secretary shall issue regulations to require that *State agencies* administering the child support enforcement program . . . petition for the inclusion of medical support as part of any child support order . . . ") (emphasis added); 42 U.S.C. § 654(3) ("[a] *State* plan . . . must . . . provide for the establishment or designation of a single and *separate organizational unit* . . . to administer the plan"); § 654(8) ("[a] State plan . . . must . . . provide that the *agency* administering the plan will establish a service to locate absent parents") (emphasis added); § 654(19)(B) ("[a] State plan . . . must . . . provide that the *agency* administering the plan . . . shall enforce any . . . child support obligations which are owed by . . . an individual" collecting unemployment compensation) (emphasis added); § 663(b) ("the *State agency* . . . will . . . receive and transmit to the Secretary requests" for parent locator information) (emphasis added).

Congress' command to "the State" and "State agencies" stands in sharp contrast to Congress' explicit reference to various federal *officials*, rather than simply to "the Federal Government" or to "the Department of Health and Human Services." *See, e.g.*, 42 U.S.C. § 652(a) ("[t]he *Secretary* shall establish . . . ") (emphasis added); § 655(a)(1) ("the *Secretary* shall pay to each State . . . "); § 653(e)(2) (requiring any "*individual* who is the head of any department, agency, or instrumentality of the United States" to search through files "promptly" when requested by the Secretary) (emphasis added). *See also* 42 U.S.C. § 659(c) (providing immunity from liability to any "[f]ederal employee" who discloses information within the scope of his duties).

[14] Indeed, Congress' only explicit references to State actors are its permission for "authorized persons" of the State to request and receive parent locator information from the Secretary, § 653(c), or to notify an official in the uniformed services of an active serviceperson's delinquency in child support payments, § 665(a)(1), § 665(b).

[15] The Court has employed similar restraint before finding additional remedies available against *federal* officials. In

appropriate because it has as its source the principles of federalism and separation of powers embodied in our constitutional structure. Demanding a clear statement from Congress before altering the federal-state balance is hardly unusual in this Court's jurisprudence. *See, e.g., Gregory*, 501 U.S. at 470; *Will*, 491 U.S. at 65 (§ 1983 case employing "the ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute' ") (quoting *Atascadero State Hosp.*, 473 U.S. at 242).

Because Title IV-D speaks only of States and their agencies and its remedial scheme does not incorporate private injunctive relief against State officials, the Eleventh Amendment precludes such relief.

III. *MAINE v. THIBOUTOT* DOES NOT COMPORT WITH THE MEANING OF § 1983, THIS COURT'S CLEAR STATEMENT PRINCIPLES, OR FEDERALISM AND SEPARATION OF POWERS PRINCIPLES, AND SHOULD BE RECONSIDERED.

One hundred and nine years after § 1983's enactment, this Court, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), extended § 1983's reach to nonconstitutional "rights" secured solely by federal statutes that had no relationship to the civil rights concerns that plainly animated the post-Civil War Congress' enactment of § 1983. Suits brought under § 1983, such as the one here, in which the "right"

Schweiker v. Chilicky, 487 U.S. 412 (1988), cited approvingly by the Court in *Seminole Tribe* (116 S. Ct. at 1132), the Court held that Title II of the Social Security Act precluded damage actions against federal officials under the doctrine of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), because "[t]he Act . . . makes no provision for remedies in money damages against officials . . . ." *Schweiker*, 487 U.S. at 424.

allegedly secured by statute is the right to potential government benefits or services, were not permitted before *Thiboutot* because the "right" at issue did not create an implied private cause of action and was based on Congress' spending power, not the Fourteenth Amendment.

Since *Thiboutot* (and in conflict with that decision), this Court has been quite forceful in demanding clear statements from Congress before inferring or creating private causes of action that are missing from a statute's express terms. Such reticence is firmly grounded in separation of powers principles because this Court has recognized that the creation of statutory causes of action is a quintessentially legislative task. In the context of § 1983, however, federalism concerns provide an additional reason for courts to be reluctant to expand congressional remedies. *See Board of Regents of the Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 492 (1980) ("[c]onsiderations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983"). It is thus ironic that it has become *easier* to sue a State official under a *Thiboutot* action than it is to sue a private individual under the Court's test for implied causes of action. *See Cort v. Ash*, 422 U.S. 66 (1975). This is so because the *Thiboutot-Wright* test eliminates a putative plaintiff's burden of demonstrating three of the four *Cort* factors. *Wilder*, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting).

The State Director respectfully suggests that the *Thiboutot* Court misconstrued the explicit language of § 1983 and interpreted it more broadly than is warranted. The text of § 1983 and the structure of the Act from which it derives admit of two possible interpretations. Neither of these interpretations supports the broad interpretation that the *Thiboutot* Court adopted: (1) because § 1983 provides a cause of action against state actors for "deprivation of *rights* . . . secured by . . . laws," § 1983 is limited to providing a cause of action only for those statutory rights that already have some private cause of action associated with them, which Title IV-D does not (see *supra* p. 12 n.3),

or (2) § 1983 is restricted by the scope of the Fourteenth Amendment and § 1983's complementary jurisdictional provision, 28 U.S.C. § 1343(a)(3), to providing a cause of action for deprivations of equal or civil rights, which Title IV-D does not protect.

In light of the *Thiboutot* Court's erroneous and overbroad construction of § 1983 and the resulting unworkable standards arising out of that decision, the State Director respectfully asks this Court to reconsider its decision in *Thiboutot*.

A. The Only Statutory Rights to Which § 1983 Applies Are Those Under Which the Individual Plaintiff Has Been Granted a Cause of Action.

In *Thiboutot*, this Court claimed to apply a plain meaning construction to § 1983. *See* 448 U.S. at 4. By focusing only on the phrase "and laws," rather than on the statute as a whole,[16] the Court missed the plain meaning of § 1983 in its entirety. Section 1983 provides a federal cause of action against state actors who deprive a "person . . . of any rights . . . secured by . . . laws." 42 U.S.C. § 1983. Thus, the only violations of federal law that are actionable under § 1983 are those that involve deprivations of personal statutory *rights* that are *secured* by law to an individual. *See Golden State*, 493 U.S. at 106. *Thiboutot* ignored what it means for a personal "right" to be "secured" by a law, and, in the process, conferred a sweep to § 1983 that was completely unintended by Congress. Consequently, this Court has never addressed the argument set forth below.

Congress enacted § 1983 (or, more accurately, its predecessor, § 1 of the Ku Klux Act of 1871) to provide a federal court cause of action against state actors. *Mitchum*

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[16] " '[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations omitted).

v. Foster, 407 U.S. 225, 242 (1972) ("the very purpose of § 1983 was to interpose the federal courts between the States and the people"); *Monroe v. Pape*, 365 U.S. 167, 174 (1961) (§ 1983 was intended "to provide a federal remedy where the state remedy . . . was not available in practice"). General federal question jurisdiction was not introduced until the Judiciary Act of 1875. 18 Stat. 470, 470-73 (pt. 3) (1875); see R. Fallon, D. Meltzer, and D. Shapiro, *Hart and Weschler's The Federal Courts and the Federal System* 880-81 (4th ed. 1996). Thus, § 1983 was needed not only to provide a federal forum, but also to limit the Eleventh Amendment immunity and state law defenses that State defendants would otherwise enjoy. Without § 1983, causes of action that existed elsewhere under federal statutory law and that could be used against private individuals could not be used against state actors. Section 1983 was, at most, an equalizer – to the extent that any private actor would be liable to an individual for violating a statutory right, so would a state actor.[17] The key principle, however – and the one that the *Thiboutot* Court overlooked – is that the "right" must be one that is already "secured" by another, substantive law; *i.e.*, the right must be based upon a cause of action that some plaintiff could already bring against some defendant. *See Chapman*, 441 U.S. at 617 ("[n]o matter how broad the § 1 cause of action may be, the breadth of its coverage does not alter its *procedural character*. . . . [O]ne cannot go into court and claim a 'violation of § 1983' – for § 1983 by itself does not protect anyone against anything") (emphasis added).

Section 1983 merely enforces individual rights secured elsewhere. *See id.* When faced with a statute that does not itself provide a person with an express private

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[17] Section 1983 also expanded the remedies available to a plaintiff suing a state actor by subjecting the state actor "in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

cause of action, courts are still left with the task of determining whether Congress intended to create a personal "right" that § 1983 could enforce. Thus, the courts' role in the § 1983 context should not differ at all from their role in discerning the extremely rare circumstance in which Congress intended to create an implied cause of action in a particular statute. Both inquiries attempt to divine Congress' *intent* to create a private cause of action. *See Sea Clammers*, 453 U.S. at 13 ("[t]he key to the inquiry is the intent of the Legislature"); *Pennhurst I*, 451 U.S. at 15; *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979); *Wilder*, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting); *Wright*, 479 U.S. at 432-33 (O'Connor, J., dissenting). Yet, paradoxically, under *Thiboutot*, the Court requires less of a plaintiff seeking to sue a state actor under § 1983 than it demands of a plaintiff seeking to sue a private individual under an implied cause of action. *Wilder*, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting) (test under § 1983 eliminates burden of demonstrating three out of four *Cort* factors).

Thiboutot is plainly inconsistent with this Court's more recent precedents that require Congress to state clearly its intention to create any new private cause of action. In particular, this Court recently reemphasized the important role that federalism plays by requiring that Congress provide an "unmistakably clear" statutory statement of intent to abrogate the States' sovereign immunity, even when Congress acts pursuant to its power under section 5 of the Fourteenth Amendment. *Seminole Tribe*, 116 S. Ct. at 1123-24. Indeed, this Court has insisted that Congress express its intent clearly, especially when, as here, the statute provides an administrative scheme for enforcement. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102-05 (1991); *Karaholios*, 489 U.S. at 532-33; *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).[18]

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[18] This Court should refuse to indulge in excessive speculating about what Congress intended and – relying upon core separation of powers principles – insist that no private cause of action to enforce a federal statute exists unless Congress plainly provides. As Justice Powell observed: "When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Cannon v. University of Chicago*, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting). Otherwise, "[r]ather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide." *Id.* at 743.

Against this backdrop, *Thiboutot*'s presumption that a § 1983 action is available unless Congress has clearly *withdrawn* the remedy (*Wilder*, 496 U.S. at 508 n.9) is astonishing and wrong. Section 1983 provides a remedy only if a person has an enforceable "right" that has already been "secured" by another substantive statute. A statute can hardly be said to "secure" a "right" to a "person" if that person cannot sue under the statute. As this Court stated in *Golden State*, a "claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in the particular plaintiff." 493 U.S. at 107 n.4. Rather, the proper test for what constitutes a "right" in § 1983 is whether the underlying law creates "[a] legally enforceable *claim* of one person against another." *See Dennis*, 498 U.S. at 447 n.7 (emphasis added). This interpretation of § 1983 is reinforced by the Court's adoption of clear statement principles to interpret § 1983. There is no reason to reverse the Court's clear statement principles when determining if a § 1983 action was intended. *See Will*, 491 U.S. at 65 (§ 1983 case requiring Congress to make its intention "unmistakably clear" and "clear and manifest" (citations omitted)). However, that is precisely what *Thiboutot* and its progeny have improperly done. *See Wright*, 479 U.S. at 423-24 (" '[w]e do not lightly conclude that Congress intended to preclude reliance on § 1983 as a

remedy' for the deprivation of a federally secured right") (quoting *Smith*, 468 U.S. at 1012).

Interpreting § 1983 to insert private causes of action into federal statutes when Congress did not clearly authorize the actions is unreasonable. A more appropriate construction would interpret § 1983, in light of both its clear language and its history, to apply at most only to statutes that already contain some form of private right of action in federal court.[19]

Reconsidering *Thiboutot* is not, however, the only way to redress the ironic asymmetry between the standards for creating an implied private right of action and for enforcing a statutory right under § 1983. The asymmetry may be effectively resolved by reconsidering the inferences to be drawn from limited express remedies for statutory rights. In the context of an implied cause of action against a private person, this Court has consistently held that it is improper for a court to supplement express statutory remedies even if they are limited. As this Court unanimously held in *Karahalios*, it is "an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." 489 U.S. at 533. The critical question under *Karahalios* is whether the statute provides "a remedy," not whether it confers a remedy a court might view as "comprehensive." *See id.* In deciding whether a statute is enforceable under § 1983, however, this Court has taken precisely the opposite approach to express remedies. The Court has held that a § 1983 remedy will be available to enforce a statute unless the statute establishes a remedy that "can . . . be considered sufficiently comprehensive." *Wilder*, 496 U.S.

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[19] Construing § 1983 in the way that Petitioner proposes would have *no* effect on a putative plaintiff's ability to use § 1983 as a vehicle for redressing violations of *constitutional* rights by state actors because the Constitution itself creates causes of action. *See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

at 522; *see also Wright*, 479 U.S. at 428. The short answer to *Wilder* and *Wright* is that where Congress has enacted remedies, it has concluded that those remedies are "sufficiently comprehensive" (or else it would have provided additional remedies), and a court has no license to second-guess Congress' determination. Where Congress has created an enforcement scheme, courts "are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Sea Clammers*, 453 U.S. at 15.

As this Court held last Term in *Seminole Tribe*, the fundamental principle of judicial restraint and statutory construction applies whenever a court is faced with an attempt to supplement and thus evade a congressional remedy in favor of some other remedy beyond that created in the underlying statute. 116 S.Ct. at 1132. This Court should reject the expansive approach of *Wilder* and *Wright* and follow the traditional rule applied in *Karahalios* and *Sea Clammers* and reaffirmed in *Seminole Tribe*.

B. Section 1983's Application to "Laws" Is Limited to the Enforcement of Equal or Civil Rights.

1. Section 1983 and 28 U.S.C. § 1343(a)(3) should be read in pari materia.

The *Thiboutot* Court rejected the argument that § 1983 is limited to civil rights or equal protection laws. 448 U.S. at 6-8. An examination of that statute and its corresponding jurisdictional provision suggests that the *Thiboutot* Court erred in its statutory conclusions.

This Court has consistently reaffirmed the principle that statutory construction is a "holistic endeavor" that requires courts to evaluate all portions of an original piece of legislation together to preserve the legislation's textual integrity. *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993) (courts must "'look to the provisions of the whole law, and to its object and policy'" (quoting

Pilot Life, 481 U.S. at 51)). Thus, to implement Congress' actual intent, it is vital that the Court read § 1983 in light of its complementary jurisdictional provision, § 1343(a)(3), which provides jurisdiction only over constitutional claims and claims based on "any Act of Congress providing for *equal rights*." (Emphasis added.)

2. The circumstances and history of § 1983 confirm this interpretation.

Congress intended § 1983 to be interpreted consistent with its antecedents.[20] As Appendix B illustrates, §§ 1983 and 1343(a)(3) both have their origins in the Civil Rights Act of 1871, also known as the Ku Klux Act.[21] Act of Apr. 20, 1871, 17 Stat. 13. That statute, in turn, was based upon previous Civil Rights Acts passed in 1866 and 1870. Act of Apr. 9, 1866, 14 Stat. 27; Act of May 3, 1870, 16 Stat. 144. Congress enacted the Civil Rights Act of 1866 to implement the then-recently enacted Thirteenth Amendment. Act of Apr. 9, 1866, 14 Stat. 27. Section 1 of the 1866 Act guaranteed citizens a host of enumerated civil rights: "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, *and to full and equal benefit of all laws* and proceedings for the security of person and property." (Emphasis added.) Section 2 of the Act made deprivation under color of state law of any of the rights "secured or protected by this act" a misdemeanor.

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[20] "[T]he duty, both of interpretation and construction, so often devolving on courts, is or may be, aided much by the time, history, and attendant circumstances of the original enactment of the statute now newly arranged. . . . The original arrangement of the words, sentences, clauses, and sections of an act is valuable in ascertaining their meaning." 2 Cong. Rec. 826 (Remarks of Rep. Lawrence) (daily ed. Jan. 21, 1874).

[21] *See also Monroe*, 365 U.S. at 172-83; *Chapman*, 441 U.S. at 623-44 (Powell, J., concurring).

Congress enacted The Enforcement Act in 1870 to protect black citizens' right to vote. Act of May 3, 1870, 16 Stat. 144. Section 16 of that Act essentially mirrored the language of § 1 of the Civil Rights Act of 1866 (although it omitted references to the right to buy and sell property). Section 17, in turn, paralleled § 2 of the 1866 Act, making it a misdemeanor to deprive under color of state law any rights "secured or protected by the last preceding section of this act."

The Ku Klux Act of 1871 was intended to implement the Fourteenth Amendment. This "purpose is plain" from the Act's title, " 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,' " *Monroe*, 365 U.S. at 171 (quoting 17 Stat. 13), and is confirmed by debate on the House floor.[22] Section 1 of the 1871 Act addressed the deprivation of rights secured "by the Constitution" only; *i.e.*, "laws" were not mentioned. There was no question, however, that the more general language of the 1871 Act embodied the same set of rights enumerated in the earlier legislation.[23] In fact, § 1 engendered little debate and

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[22] Mr. Shellabarger stated in his introduction of the new legislation that "[t]hese provisions of the fourteenth amendment are wholly devoted to securing the equality and safety of all the people, as is this section [§ 1], and, indeed, the entire bill." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871); *see also* Cong. Globe App. 73 ("[t]hese rights, privileges, and immunities are recited in . . . the first section of the fourteenth article of amendments to the Constitution") (statement of Rep. Blair).

[23] "The model for [§ 1 of the Ku Klux Act] will be found in the second section of the act of April 9, 1866. . . . That section provides a criminal proceeding in *identically the same case* as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (statement of Rep. Shellabarger) (emphasis added).

passed without modification, in contrast to other sections of the Act, such as those granting the executive branch and federal courts broad powers to deal with conspiracies. *See Monroe*, 365 U.S. at 181.

3. The legislative history confirms that Congress intended no change when it added "and laws" in 1874.

In 1866, President Andrew Johnson appointed a commission to begin the overwhelming task of reorganizing all federal laws into one Act. Section 2 of the authorizing statute permitted alterations only insofar as they were necessary "to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." Act of June 27, 1866, § 2, 14 Stat. 74, 75. Six years later, Congress authorized the Joint Congressional Committee on the Revision of the Laws to assume the work of translating the product of two successive commissions into a bill. Act of Mar. 3, 1873, 17 Stat. 579. The committee "endeavored to eliminate from this everything that savors of change in the slightest degree of the existing statutes." 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) (statement of Rep. Butler).[24]

Sections 563(12), 629(16), and 1979 of the Revised Statutes of 1874 all listed § 1 of the Ku Klux Act as a source. See Appendix B. Section 563(12) supplied the district courts with jurisdiction over all suits redressing deprivation of rights "secured by the Constitution of the United States, or of any right secured by any law of the United States." The circuit court provision, § 629(16), provided jurisdiction over claims regarding deprivation under color of law of any rights "secured by the Constitution of the United States, or of any right secured by any

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[24] Indeed, the Joint Committee directed its attorney that "whenever the meaning of the law had been changed, to strike out such changes." 2 Cong. Rec. 646 (daily ed. Jan. 14, 1874) (statement of Rep. Poland).

law providing for *equal rights*" (emphasis added). The substantive provision – § 1983's forerunner – addressed rights "secured by the Constitution *and laws*" of the United States. Rev. Stat. § 1979 (emphasis added).

When revised § 1979 was read to the entire body of Representatives so that members could raise their concerns, Representative Lawrence stated, "it is possible that the new consolidated section may operate differently from the three original sections in *a very few cases*. But the change, if any, cannot be objectionable, but is valuable as securing uniformity." 2 Cong. Rec. 828 (daily ed. Jan. 21, 1874) (emphasis added). No Member of the House objected to, or at least warned of, a change in scope of the law. As this Court has noted in a similar context, "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991). Thus, the legislative history makes clear that the addition of "and laws" was not intended to enlarge § 1983's scope.

Moreover, when the Judicial Code of 1911 eliminated the circuit court's original jurisdiction, Congress rephrased what is now the district court jurisdictional provision, 28 U.S.C. § 1343(a)(3), to provide a federal forum for all causes of action based on "any right, privilege or immunity secured by the Constitution . . . or by any Act of Congress providing for *equal rights* . . . " (emphasis added). This language was intended to reflect the "present" and "existing" jurisdiction of the district courts. S. Rep. No. 388 (pt. 1), 61st Cong., 2d Sess. 1, 2, 15 (1910). "[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight." *United States v. Winstar Corp.*, 64 U.S.L.W. 4739, 4754 (U.S. July 1, 1996) (plurality opinion) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). Thus, the current § 1343(a)(3), like its antecedents' history, demonstrates that Congress never intended the reference to "laws" in § 1983 to extend beyond statutes providing for equal rights.

4. Construing §§ 1983 and 1343(3) coextensively is consistent with this Court's decisions.

When a statute's text is ambiguous, courts should construe the statute in light of its manifest purposes. *See Reves v. Ernst & Young*, 494 U.S. 56, 60-61 (1990). Thus, it is not surprising that until *Thiboutot*, this Court repeatedly interpreted § 1983 as being closely connected to the Fourteenth Amendment.[25]

In addition, prior to *Thiboutot*, this Court had consistently viewed §§ 1343 and 1983 as coextensive in scope. *See, e.g., Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-44 n.7 (1972) ("[d]espite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction *and both sections are construed identically*") (emphasis added) (citing *Douglas v. City of Jeannette*, 319 U.S. 157, 161 (1943)). In fact, in the Term just before the Court decided *Thiboutot*, it acknowledged that § 1343(3) is the "jurisdictional counterpart" of § 1983. *Chapman*, 441 U.S. at 615-16. Thus, in casting § 1983 away from its jurisdictional mooring, *Thiboutot* created an unprincipled break from sound statutory interpretation and this Court's previous precedents. *See Thiboutot*, 448 U.S. at

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[25] *See, e.g., Chapman*, 441 U.S. at 611 ("prime focus" of § 1983 was to ensure "a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto"); *District of Columbia v. Carter*, 409 U.S. 418, 425 (1973) (finding "great significance" in the fact that § 1983's purpose was to redress violations of Fourteenth Amendment rights, as distinguished from earlier civil rights laws that had been based on the broader Thirteenth Amendment); *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (§ 1983 "was enacted for the express purpose" of enforcing the Fourteenth Amendment); *Monroe*, 365 U.S. at 180 (finding it "abundantly clear" that Congress enacted § 1983 in part to provide a federal right for violations of rights that the Fourteenth Amendment guaranteed).

19-22, 26-33 (Powell, J., dissenting); *see generally Heck v. Humphrey*, 114 S. Ct. 2364, 2374 (1994) (Thomas, J., concurring) ("[i]t has long been recognized that we have expanded . . . § 1983 far beyond the limited scope [it] was originally intended to have"). The Court should return § 1983 to its original vital, but more modest, sweep.

An interpretation returning § 1983 to its Fourteenth Amendment roots also has the benefit of bringing § 1983 into harmony with the Court's most recent interpretation of the Eleventh Amendment. Under *Seminole Tribe*, Congress has the authority to abrogate a State's immunity pursuant only to the powers that the Thirteenth, Fourteenth, Fifteenth or later Amendments confer. This, of course, makes sense given that the Eleventh Amendment trumps all powers conferred in the body of the original Constitution and the later Amendments trump the Eleventh Amendment as long as Congress acts expressly. By allowing § 1983 to enforce rights that are not derived from the Fourteenth Amendment, the court below authorized Congress to do indirectly that which it unquestionably could not do directly under *Seminole Tribe*: expose the States to federal court litigation and damages actions brought by citizens to enforce noncivil rights. The Court should end this constitutional sleight of hand, which has exposed the States to so much needless litigation. By limiting § 1983 to enforcing rights that are derived from the Fourteenth Amendment alone, the Court will fully restore the Eleventh Amendment protection that it recognized in *Seminole Tribe*.

Once the Court properly interprets § 1983 as limited to equal or civil rights, it can readily dispose of this case. There is no question that Title IV-D does not create, protect, or enforce any equal or civil rights laws. Rather, it is based solely upon Congress' spending power.

C. *Stare Decisis* Should Not Deter This Court from Reconsidering Thiboutot.

This Court is naturally reluctant to reconsider its previous decisions. But "*[s]tare decisis* is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), and the Court has not felt constrained to follow decisions, such as *Thiboutot*, that "are unworkable or are badly reasoned." *Id.* at 827; *see also Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (*stare decisis* may be abandoned when prior decision has "proved to be unworkable in practice").

Because § 1983 has a "constitutional dimension," *Monroe*, 365 U.S. at 222 (Frankfurter, J., dissenting), this Court's "decisions construing the civil rights legislation of the Reconstruction era have repudiated 'blind adherence to the principle of *stare decisis*.' " *Thiboutot*, 448 U.S. at 33 (Powell, J., dissenting) (quoting *Greenwood v. Peacock*, 384 U.S. 808, 831 (1966)). Indeed, reconsideration of *Thiboutot* would certainly not be this Court's first departure from *stare decisis* in the § 1983 context. *See, e.g., Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 695-701 (1978) (overruling holding of *Monroe*, 365 U.S. at 187-92, that municipality is not a "person" within the meaning of § 1983).

Principles of *stare decisis* are particularly weak when a prior decision has not "engendered substantial reliance." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2115-16 (1995); *see also Payne*, 501 U.S. at 828. There is no evidence that potential plaintiffs such as Respondents rely on their ability to bring *Thiboutot* actions. Indeed, the pervasive confusion and uncertainty concerning just when *Thiboutot* actions are available would make any reliance on this remedial measure not merely unlikely, but also speculative. In contrast, when States choose to participate in AFDC, they expect that they will have to justify their actions to the Secretary, but they do *not* expect to be subject to potentially hundreds of thousands of *Thiboutot* actions in federal court.

D. *Thiboutot* Has Proven Completely Unworkable in Practice.

The conclusion is inescapable that *Thiboutot* has spawned excessive litigation and that its standards have been utterly unworkable. Both facts argue for its reconsideration. Justice Powell's concerns about the floodgates that *Thiboutot* opened have proven to be understated. *Thiboutot*, 448 U.S. at 22-26 (Powell, J., dissenting). *See* Appendix C. As this Court's cases confirm, the *Thiboutot* test can only be applied on a case-by-case basis. Resolution of the instant dispute on narrow grounds will not pull the judiciary out of this quagmire. Standing behind Title IV-D are a host of other complex federal-state cooperative programs that will require an exhaustive, albeit speculative, examination to determine whether they demonstrate a legislative intent to create an enforceable right. Of course, persons making this inquiry are ultimately akin to astronomers searching for a quark because Congress has long since abandoned any express or serious effort to confront the difficult policy issues that creating private causes of action to enforce social legislation pose, particularly when the cause of action would be against the State. Only by abandoning the expansive gloss of *Thiboutot* will Congress resume its proper constitutional role when it enacts new legislation.

In the lower courts, *Thiboutot* problems – including circuit splits and reversals of district court judgments – are legion. Appendix C provides a sampling of statutes through which plaintiffs have claimed a cause of action under *Thiboutot*. Each statute under which a court has permitted the suit to proceed represents another instance in which federal courts have become intertwined in the running of state government,[26] thereby altering the

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[26] What makes this intrusion worse is that it often tends to entangle the federal judiciary in the political differences between coequal branches of state government. *See B.H. v. McDonald*, 49 F.3d 294, 302-04 (7th Cir. 1995) (Easterbrook and

balance of federalism and overriding the constraints of the separation of powers.[27] Moreover, each statute listed in Appendix C also represents a problem that this Court may yet have to resolve.

Thiboutot does more than generate an endless stream of litigation. It also creates intractable puzzles and absurdities. *First, Thiboutot* has created, not surprisingly, confusion between § 1983 actions and implied causes of action. Some courts have treated implied private rights of action as precluding *Thiboutot* actions. *See, e.g., Chuhran v. Walled Lake Consol. Schs.*, 839 F. Supp. 465, 475 (E.D. Mich. 1993) (IDEA), *aff'd*, 51 F.3d 271 (6th Cir. 1995); *Ruth Anne M. v. Alvin Indep. Sch. Dist.*, 532 F. Supp. 460, 473-76 (S.D. Tex. 1982) (Rehabilitation Act). Others have treated the denial of a private right of action as precluding a *Thiboutot* action. *See, e.g., Home Health Servs. v. Currie*, 706 F.2d 497, 498 (4th Cir. 1983) (per curiam) (rejecting the existence of an implied private right of action under 42 U.S.C. § 1395a of the Medicare Act and stating that this rejection

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Goodwin, JJ., concurring). Thus, if the executive branch believes that the legislature has been too stingy in appropriating funds for the Title IV-D program, the executive might welcome a § 1983 lawsuit from private parties and look to settle the suit regardless of the legal merits by a binding federal court consent decree that required the legislature to appropriate more money. Such a distortion of the state political process should not be encouraged.

[27] In addition, because of § 1988's availability in *all* § 1983 actions, *Thiboutot*, 448 U.S. at 8-11, each successful plaintiff – or, more accurately, each successful plaintiff *class* – is awarded attorney's fees, thus creating a wholesale shift away from the "American Rule" concerning litigation costs. *Id.* at 24-25 (Powell, J., dissenting); *see also Dennis*, 498 U.S. at 464 (Kennedy, J., dissenting) (noting significance of § 1988 as incentive to bring cause of action under § 1983).

"compels the conclusion that Home Health likewise has no cause of action under [§] 1983").[28]

Second, Thiboutot's presumption that § 1983 is available unless the statute's remedial scheme is "sufficiently comprehensive and effective" (*Wright*, 479 U.S. at 425) has allowed § 1983 to supplant numerous statutory enforcement schemes, leading to excessive, duplicative, and inconsistent enforcement. For example, guided by the principle of *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), that exhaustion of state remedies is not a prerequisite for a § 1983 action, courts generally presume that exhaustion of statutory remedies is not a prerequisite for a *Thiboutot* action, absent "firm evidence of congressional intent." *Alacare, Inc.-North v. Baggiano*, 785 F.2d 963, 967 (11th Cir.), *cert. denied*, 479 U.S. 829 (1986); *see also Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D. N.J. 1992). Courts have not only held that exhaustion is unnecessary with respect to state administrative remedies required by federal law (*see, e.g., id.*), but have also held that it is unnecessary with respect to *federal* administrative procedures. *See Mrs. W. v. Tirozzi*, 832 F.2d 748, 758 (2d Cir. 1987) (EHA); *Krebs*, 797 F. Supp. at 1257 (Family Education Rights and Privacy Act); *Hendrickson v. Griggs*, 672 F. Supp. 1126, 1132 (N.D. Iowa 1987) (Juvenile Justice and Delinquency Prevention Act).

Third, jurisprudence concerning the availability of § 1983 is so confusing that congressional attempts to provide answers to the questions that it engenders under

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[28] *Thiboutot* also restricts courts' ability to provide purely injunctive relief. Courts generally cannot find that an implied private right of action for injunctive relief against state officials or political subdivisions is available without also finding that § 1983 damages relief is available. As a result, courts generally cannot discern congressional intent to provide purely injunctive relief against such actors unless it is stated explicitly. *See Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting) (suggesting that scope of § 1983 should be limited to give courts greater freedom to find injunctive and declaratory relief as the sole remedy).

the current judicial framework can themselves breed further confusion. For example, Congress recently enacted 42 U.S.C. § 1320a-2 in response to this Court's decision in *Suter*. See *supra* p. 14 n.4. Although Congress intended to "overturn . . . any . . . grounds applied in *Suter* . . . but not applied in prior Supreme Court decisions respecting such enforceability," Congress gave no hint what it thought *Suter*'s "grounds" were or what "grounds" it thought existed pre-*Suter*.[29] It did not take long at all for courts to develop conflicting constructions of the *Suter* amendment. *Cf. LaShawn A. v. Barry*, 69 F.3d 556 (D.C. Cir. 1995) (§ 1320a-2 has no effect on determination of when *Thiboutot* actions may be found), *vacated on other grounds*, No. 94-7044, 1996 WL 378608 (D.C. Cir. July 9, 1996), *with Jeannie B. by Blondis v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995) (§ 1320a-2 overrules *Suter*); *Harris v. James*, 883 F. Supp. 1511, 1520 (M.D. Ala. 1995) (same). Thus, even when Congress has addressed the availability of § 1983 actions in light of its understanding of the judicial standard, it has failed to clarify the issues involved.

* * *

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), this Court justified its restriction of the judicial *protections* that the States would receive under the Tenth Amendment by pointing to the inherent political power that the States could wield in Congress. But a decision like *Thiboutot*, which shifts authority for imposing extraordinary *burdens* on the States from Congress to an unelected judiciary, renders illusory whatever political power the States might possess to protect against unwarranted federal encroachment. If the promise of *Garcia* is to

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[29] In fact, Congress expressly *declined* to overrule the actual holding of *Suter*. *See* 42 U.S.C. § 1320a-2 ("this section is not intended to alter the holding in *Suter* . . . that section 671(a)(15) of [the Social Security Act] is not enforceable in a private right of action").

have any meaning, it is vital that the Court return § 1983 to its original understanding and thereby require Congress to act directly and expressly when it seeks to impose liability on the States and their actors to further national interests. *See Gregory*, 501 U.S. at 464 (citing L. Tribe, *American Constitutional Law* §§ 6-25, p. 480 (2d ed. 1988)). Accordingly, the Court should reconsider its decision in *Thiboutot* and limit the sweep of § 1983 so that it is consistent with the Eleventh Amendment, § 1343(a)(3), and implied right of action precedent.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court below and order that Respondents' suit be dismissed.

Respectfully submitted,

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APPENDIX A

PERTINENT TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, § 8, cl. 1 of the Constitution provides in pertinent part: "The Congress shall have Power To . . . provide for the . . . general Welfare of the United States."

2. The Eleventh Amendment of the Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

3. Section 1 of the Fourteenth Amendment of the Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

4. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B

LEGISLATIVE HISTORY OF § 1983 TRACED BACK TO CIVIL RIGHTS ACT OF 1866

Contents: Page

1. Pertinent sections of:
   a. The Civil Rights Act of 1866 ..... App. 2
   b. The Enforcement Act of 1870 ..... App. 5
   c. The Ku Klux Act of 1871 ..... App. 7
   d. The Revised Statutes of 1874 ..... App. 8
   e. The United States Code of 1925 (1st ed.) ... App. 11
   f. The United States Code of 1953 (5th ed.) ... App. 11
2. Chart Depicting § 1983's Legislative Roots ..... App. 12

CIVIL RIGHTS ACT OF 1866

(14 Stat. 27)

"**SEC. 1.** *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and

equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

[Subsequent statutes developed from this Section: (1) § 16 of the Enforcement Act of 1870; (2) §§ 1977, 1978 of the Revised Statutes of 1874.]

"**SEC. 2.** *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

[Subsequent statutes developed from this Section: (1) § 17 of the Enforcement Act of 1870; (2) § 1 of the Ku Klux Act of 1871; (3) §§ 563(12), 629(16), 1979, 5510 of the Revised Statutes of 1874; (4) 8 U.S.C. § 43; (5) 42 U.S.C. § 1983.]

"**SEC. 3.** *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several

States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendants shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or

criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty."

[Subsequent statutes developed from this Section: (1) § 18 of the Enforcement Act of 1870; (2) §§ 563(12), 629(16) of the Revised Statutes of 1874.]

ENFORCEMENT ACT OF 1870

(16 Stat. 144)

"**SEC. 16.** *And be it further enacted*, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void."

[Subsequent statute developed from this Section: § 1977 of the Revised Statutes of 1874.]

"**SEC. 17.** *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court."

[Subsequent statutes developed from this Section: (1) § 1 of the Ku Klux Act of 1871; (2) §§ 563(12), 629(16), 1979, 5510 of the Revised Statutes of 1874; (3) 8 U.S.C. § 43; (4) 42 U.S.C. § 1983.]

"**SEC. 18.** *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

[Subsequent statutes developed from this Section: (1) §§ 563(12), 629(16) of the Revised Statutes of 1874.]

1871

THE KU KLUX ACT

(17 Stat. 13)

"**SEC. 1.** *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases."

[Subsequent statutes developed from this Section: (1) §§ 563(12), 629(16), 1979 of the Revised Statutes of 1874; (2) 8 U.S.C. § 43; (3) 42 U.S.C. § 1983.]

REVISED STATUTES OF 1874

"SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. [See § 858.]"[1]

Margin annotation: "Equal rights under the law."

"SEC. 1978. All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Margin annotation: "Rights of citizens in respect to real and personal property."

"SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the

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[1] Brackets and citations therein appeared in original Revised Statutes of 1874.

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [See §§ 563, 629.]"

Margin annotation: "Civil action for deprivation of rights."

[Subsequent statutes developed from this Section: (1) 8 U.S.C. § 43; (2) 42 U.S.C. § 1983.]

"SEC. 563 The district courts shall have jurisdiction as follows:

* * *

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof. [See §§ 1977, 1979.]"

Margin annotation: "Suits to redress deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States."

"**SEC. 629** The circuit courts shall have jurisdiction as follows:

* * *

Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. [See §§ 1977, 1979.]"

Margin annotation: "Suits to redress deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States."

"**SEC. 5510.** Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both. [See § 1979.]"

Margin annotation: "Depriving citizens of civil rights under color of State laws."

UNITED STATES CODE OF 1925 (1st ed.)

"**8 U.S.C. § 43. Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)"

[Subsequent statute developed from this Section: 42 U.S.C. § 1983.]

UNITED STATES CODE OF 1953 (5th ed.)

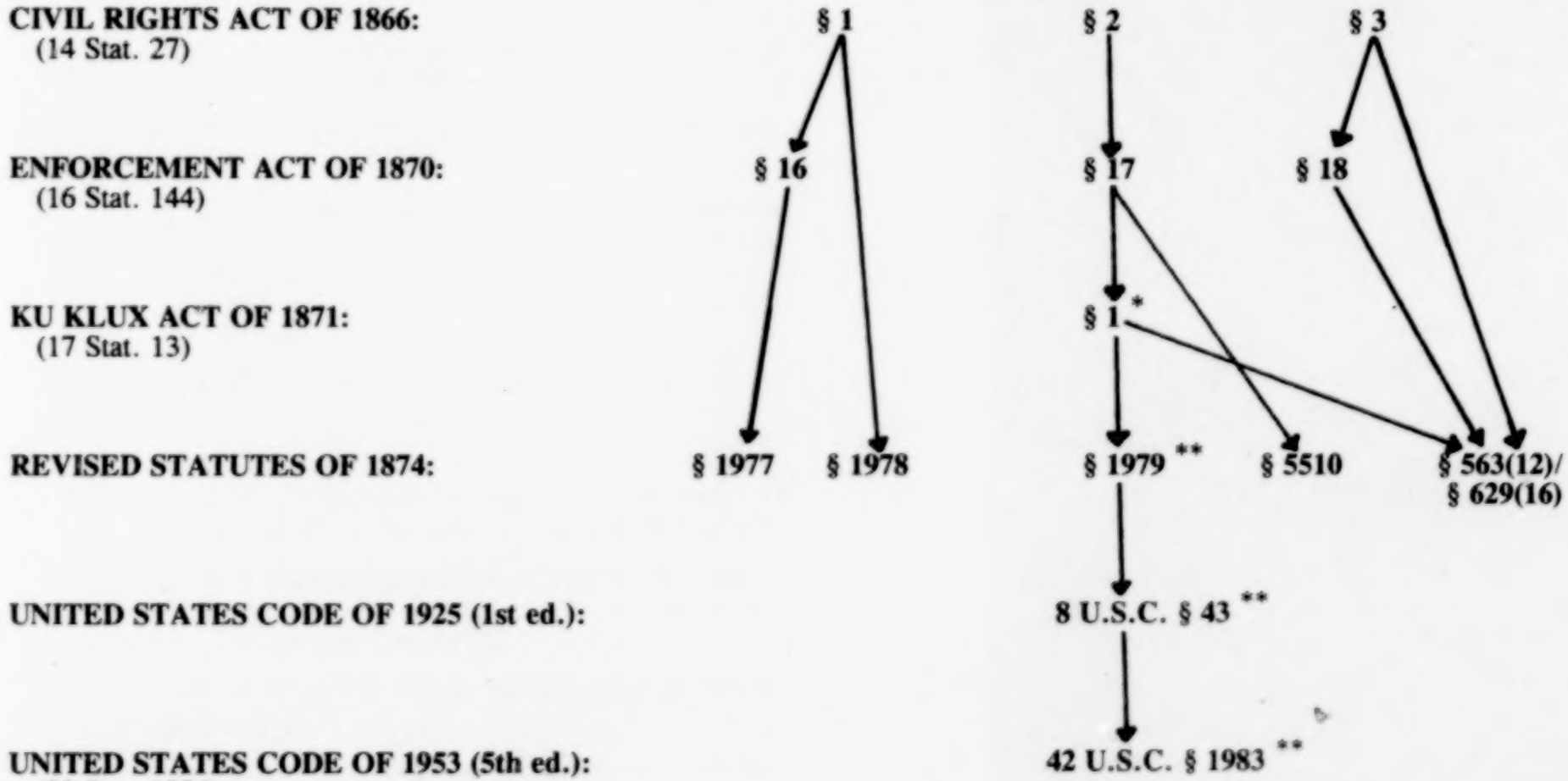
"**42 U.S.C. § 1983. Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S. § 1979.)"

[1979 amendment of § 1983 added the words "or the District of Columbia" following "Territory." Pub. L. 96 170.]

Appendix B

LEGISLATIVE HISTORY

ROOTS OF § 1983 TRACED BACK TO CIVIL RIGHTS ACT OF 1866



* "Secured by the Constitution of the United States"
** "Secured by the Constitution and laws"

APPENDIX C

SAMPLING OF STATUTES AND CASES RAISING *THIBOUTOT* ISSUES

I. STATUTES THAT HAVE ENGENDERED CIRCUIT SPLITS ON THE AVAILABILITY OF § 1983 TO ENFORCE THEIR PROVISIONS.

A. The Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. §§ 8621-8629.

- Permitting § 1983 action: *Crawford v. Janklow*, 710 F.2d 1321 (8th Cir. 1983).
- Not permitting § 1983 action: *Cabinet for Human Resources v. Northern Ky. Welfare Rights Ass'n*, 954 F.2d 1179 (6th Cir. 1992); *Hunt v. Robeson County Dept. of Social Servs.*, 816 F.2d 150 (4th Cir. 1987).

B. The Model Cities Act of 1966, 42 U.S.C. §§ 3301 *et seq.*

- Permitting § 1983 action: *Bridgeport Housing Auth. Police Force v. City of Bridgeport*, 646 F.2d 55 (2d Cir.), *cert. denied*, 454 U.S. 897 (1981).
- Not permitting § 1983 action: *Former Special Project Employees Ass'n v. City of Norfolk*, 909 F.2d 89 (4th Cir. 1990).

C. Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-699.

- Permitting § 1983 action: *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995); *Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258 (1st Cir. 1993); *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1373 (1994).
- Not permitting § 1983 action: *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991); *Wehunt v.*

Ledbetter, 875 F.2d 1558 (11th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

D. The Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021-2027.

- Permitting § 1983 action: *Boyle v. Burke*, 925 F.2d 497 (1st Cir. 1991).
- Not permitting § 1983 action: *Grady v. El Paso Community College*, 979 F.2d 1111 (5th Cir. 1992).

II. STATUTES FOR WHICH THE COURTS OF APPEALS HAVE FACED THE QUESTION WHETHER A § 1983 REMEDY IS AVAILABLE.

A. Statutes for Which the Courts of Appeals Have Permitted § 1983 Actions.

1. The Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq. Kerr-McGee Chem. Corp. v. City of West Chicago*, 914 F.2d 820, 824-25 (7th Cir. 1990).

2. The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq. Playboy Enters., Inc. v. Public Serv. Comm'n of Puerto Rico*, 906 F.2d 25 (1st Cir.), *cert. denied*, 498 U.S. 959 (1990).

3. The Consolidated Farm and Rural Development Act, 7 U.S.C. § 1926. *Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 2000 (1995).

4. A federal highway construction statute, 23 U.S.C. § 301. *Clallam County v. Department of Transp.*, 849 F.2d 424 (9th Cir. 1988), *cert. denied*, 408 U.S. 1008 (1989).

5. The Housing Act of 1949, 42 U.S.C. § 1455(c)(1) (1982). *Pietroniro v. Borough of Oceanport*, 764 F.2d 976 (3d Cir.), *cert. denied*, 474 U.S. 1020 (1985).

6. The Housing and Community Development Act of 1974, 42 U.S.C. § 5310. *Chan v. City of New York*, 1 F.3d 96 (2d Cir.), *cert. denied*, 114 S. Ct. 472 (1993).

7. The Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993).

8. The Rehabilitation Act of 1973, 29 U.S.C. §§ 721(a)(8) - (9). *Marshall v. Switzer*, 10 F.3d 925 (2d Cir. 1993).

9. The Social Security Act, tit. IV-E, 42 U.S.C. §§ 670 *et seq. Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983).

10. The Supplemental Food Program for Women, Infants, and Children, 42 U.S.C. § 1786. *Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984).

11. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4625 (1971). *Pietroniro v. Borough of Oceanport*, 764 F.2d 976 (3d Cir.), *cert. denied*, 474 U.S. 1020 (1985).

B. Statutes for Which the Courts of Appeals Have Not Permitted § 1983 Actions.

1. The Civil Rights Act, tit. VII, 42 U.S.C. §§ 2000e *et seq.* (1964). *Polson v. Davis*, 895 F.2d 705 (10th Cir. 1990).

2. The Comprehensive Employment Training Act, 29 U.S.C. § 801 *et seq.* (1977). *Davis v. Mobile Consortium of CETA*, 857 F.2d 737 (11th Cir. 1988).

3. The Federal Aviation Act of 1958, 49 U.S.C. §§ 1305, 1349 (1982). *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986).

4. The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136 *et seq. Almond Hill Sch. v. United States Dep't of Agriculture*, 768 F.2d 1030 (9th Cir. 1985).

5. The Housing Act of 1949, 42 U.S.C. §§ 1437, 1441, 1441a. *Perry v. Housing Auth. of the City of Charleston*, 664 F.2d 1210 (4th Cir. 1981).

6. The Housing Act of 1937, 42 U.S.C. §§ 1437d(c)(3)(ii), 1437d(c)(4)(A)(1983). *Phelps v. Housing Auth. of Woodruff*, 742 F.2d 816 (4th Cir. 1984).

7. The Justice System Improvement Act, 42 U.S.C. § 3789g. *Polchowski v. Gorris*, 714 F.2d 749 (7th Cir. 1983).

8. The Medicare Catastrophic Act of 1988, 42 U.S.C. § 1396a(c)(1). *Audette v. Sullivan*, 19 F.3d 254 (6th Cir. 1994).

9. The Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396a(c)(1). *Stowell v. Ives*, 976 F.2d 65 (1st Cir. 1992).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY TO PETITIONER'S OPPOSITION ON MOTION TO REMAND OR TO DISMISS

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REPLY TO PETITIONER'S OPPOSITION ON MOTION TO REMAND OR TO DISMISS

It has been common ground in this case that, under the analysis mandated by this Court's decisions in *Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498 (1990) and *Suter v. Artist M.*, 503 U.S. 347 (1992), the viability of plaintiffs-respondents' 42 U.S.C. § 1983 case turns on the specifics of part IV of the Social Security Act, 42 U.S.C. § 601 *et seq.* In our Motion we demonstrated that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Reconciliation Act"), Pub. L. No. 104-193, makes substantial changes to a number of the part IV provisions that all concerned have regarded as pertinent to the *Wilder/Suter* analysis. (Petitioner's opening Brief on the Merits discusses at length these now-superseded provisions. Pet. Br. at 12-23.)

Petitioner's response ("Pet. Resp.") does not in its essence take issue with that showing. Instead, petitioner urges (Pet. Resp. at 6-10) that this Court retain jurisdiction, leap over the existing *Wilder/Suter* analysis for deciding when a plaintiff may bring suit under § 1983, and go directly to a constitutional question—whether "the Eleventh Amendment precludes a § 1983 cause of action against state officials to enforce the provisions of Title IV-D of the Social Security Act" (Pet. Br. at i, 23)—and to a question that would require the Court to overturn a sixteen-year old decision that itself relied on years of precedent and that is the direct antecedent of *Wilder* and *Souter*, among other of this Court's cases—"whether *Maine v. Thiboutot*, 448 U.S. 1 (1980) . . . should be reconsidered. . ." (Pet. Br. at i, 30).[1] Yet, petitioner con-

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[1] Petitioner's Response states that petitioner seeks only to "limit" *Maine v. Thiboutot*. Pet. Resp. at 9. Petitioner's Brief, though, makes quite clear that petitioner is seeking to have the Court overrule the exact holding of *Thiboutot*, based on the exact same arguments addressed at length by the opinions of the Court in *Thiboutot*. Pet. Br. i, 30, 35, 37-44, 44-48; *see Thiboutot* as well as *Chapman*

cedes that in the end remand may well be necessary to allow the courts below to apply the *Wilder/Suter* analysis and determine whether there is a cause of action under § 1983 for statutory violations of part IV-D of the Social Security Act, as amended by the Reconciliation Act. Pet. Resp. at 7 n.4.

1. This response, we submit, asks this Court to invert two of its most basic decisional rules:

First, "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). " 'This is a fundamental rule of judicial restraint' " (*Jean v. Nelson*, 472 U.S. 846, 854 (1985), *quoting Three Affiliated Tribes etc. v. Wold Engineering*, 467 U.S. 138 (1984)), and, indeed, the "one doctrine more deeply rooted than any other in the process of constitutional adjudication" (*Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105(1944)). Thus, "[*p*]*rior* to reaching any Constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Jean v. Nelson*, *supra*, at 854 (emphasis supplied), quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981).

The consideration of whether to overturn precedent is, as well, a last resort in light of the strong *stare decisis* policies favoring stability and predictability in the law. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-57 (1992) (joint opinion of O'Connor, Kennedy, Souter); *Welch v. Texas Dept. of Highways etc.*, 483 U.S. 468, 494 (1987).[2]

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v. Houston Welfare Rights Organization, 441 U.S. 600 (1979); *id.* at 623 (Powell, J., concurring); *id.* at 646 (White, J., concurring), canvassing the same materials petitioner now presents again.

[2] These policies, as this Court had reason to repeat the last time it considered overturning a long-standing precedent construing one of the post-civil war civil rights statutes, are particularly strong where statutory issues are involved. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

Thus, contrary to petitioner's supposition, in the normal course—that is, had there been no statutory change—the Court would address petitioner's "broad issues", if at all, *after*, not before, deciding how the case comes out under the existing precedents that stress the statutory-specific nature of the § 1983 inquiry. *See, e.g., Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (deciding to reconsider a case holding that Congress had the power to abrogate a state's sovereign immunity to suit only after deciding first whether Congress intended in the Indian Gaming Regulatory Act to abrogate a state's sovereign immunity to suit).

Second, neither of the "broad issues" petitioner now wants the Court to decide in order to avoid considering the impact of the statutory changes worked by the Reconciliation Act were included in the Question Presented in the Petition for Writ of Certiorari. *See* Motion at 1, quoting the original Question. Far from calling for the complete abandonment of settled law, the Question Presented in the Petition invokes "this Court's precedents." Pet. at i.

In fact, neither the Petition itself nor petitioner's Reply to the Brief in Opposition to the Petition for Writ of Certiorari ("Cert. Reply") cites *Maine v. Thiboutot at all*. This Court's certiorari procedures are not intended to permit petitioners to establish jurisdiction by stealth over issues not raised in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 34 (1993), *quoting Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality opinion) ("we continue to strongly 'disapprove the practice of smuggling additional issues into a case after we grant certiorari.' ")[3]

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[3] Had the petition raised the question of reconsidering *Maine v. Thiboutot* as a separate Question Presented, respondents could have presented at that juncture the *stare decisis* considerations counseling against revisiting *Thiboutot*, and the Court could then have determined whether to grant certiorari on that particular question. *See Izumi Seimitsu, supra*, 510 U.S. at 32 n.6, *quoting Irvine v.*

As to the Eleventh Amendment question, while petitioner in its Cert. Reply did cite an Eleventh Amendment case, *Seminole Tribe of Florida v. Florida, supra,* it did so not to raise any Eleventh Amendment issue but, instead, to bolster an argument concerning statutory interpretation of part IV-D under the existing § 1983 framework. *See* Cert. Reply at 7 ("this shows congressional intent to allow the States the greatest amount of flexibility . . . . *See Seminole Tribe of Florida v. Florida* . . ."). Again, there is nothing in the certiorari papers asking that certiorari be granted to decide an Eleventh Amendment question.[4]

California, 347 U.S. at 129-30 (plurality opinion) (emphasis supplied) ("The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid *settled*, frivolous or state law questions.")

[4] Had the certiorari papers raised an Eleventh Amendment issue implicating the matters covered in *Seminole*, the Court would have had the opportunity to consider whether to remand the case to the Ninth Circuit for the purpose of assessing the impact of *Seminole*, as the Court in fact did with six other court of appeal cases on its certiorari docket in which the appellate court's decision had been issued prior to *Seminole*. *See University Of Houston v. Chavez*, 116 S.Ct. 1667 (1996); *Ohio Agricultural Commodity Depositors Fund v. Mahern*, 116 S.Ct. 1411 (1996); *Oklahoma v. Ponca Tribe*, 116 S.Ct. 1410 (1996); *Montana v. Fort Belknap Indian Community*, 116 S. Ct. 1410 (1996); *Jessup v. Blackfeet Tribe*, 116 S. Ct. 1410 (1996); *Washington v. Spokane Tribe*, 116 S. Ct. 1410 (1996). We recognize that petitioner maintains that "to remand this case to the Ninth Circuit would be a waste of time" because that court "lack[s] . . . concern for State sovereignty." Pet. Resp. at 8 n.6. But three of the cases remanded after *Seminole* were remanded to the Ninth Circuit, and the Ninth Circuit ordered those cases dismissed on Eleventh Amendment grounds. *Fort Belknap Indian Community v. Montana*, 84 F.3d 1222 (9th Cir. 1996); *Blackfeet Tribe v. Jessup*, 85 F.3d 465 (9th Cir. 1996); *Spokane Tribe v. Washington State*, 91 F.3d 1350 (9th Cir. 1996). *See also Natural Resources Defense Council v. California Department of Transportation*, —— F.3d ——, 1996 U.S. App. Lexis 24316 (9th Cir. 1996) (analyzing under *Seminole* the question whether a suit is available under the Clean Water Act, 33 U.S.C. § 1251(e)).

In any event, petitioner is wrong in her assertion that the Reconciliation Act has no bearing on the Eleventh Amendment issue she seeks to have this Court decide. Pet. Resp. at 9. Petitioner represents that "the Reconciliation Act continues to require actions from and impose obligations on participating 'States' and their 'state agencies,' not upon State officers . . ." *Id.* While this was true of the former Social Security Act provision on which petitioner most relied in her opening Brief, 42 U.S.C. § 602(a)(27), it is *not* true of the replacement for that section contained in part IV-A of the Social Security Act ("SSA") as amended by the Reconciliation Act. That provision now requires "the chief executive officer of the State" to certify that the State will comply with part IV-D. Reconciliation Act § 101, enacting new SSA § 402 (a)(2), 42 U.S.C. § 602(a)(2), H.R. Rep. No. 104-725 (Conf. Rep.) at p. 11.[5] The changes wrought by the Reconciliation Act therefore are directly relevant to petitioner's Eleventh Amendment argument

2. As to those statutory-specific questions on which this Court did grant certiorari, the new Reconciliation Act is, as petitioner really does not dispute, likely to be of central importance in considering the parties' arguments.

Given the Response's single-minded focus on part IV-D of the Social Security Act (Pet. Resp. at 3-4), it is important to understand that while this case concerns the enforceability of the standards enacted in part IV-D, the child support services provision, the issue whether those standards are in fact enforceable has from the outset of the case involved issues at the intersection of parts IV-D *and* part IV-A. It is part IV-A that requires states to have a part IV-D program as a condition of receiving part IV-A funds, and that establishes as a penalty for failing to meet part IV-D requirements the docking of part IV-D

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[5] Although our Motion mentioned the differences between former § 602(a)(27) and new § 602(a)(2), we did not have occasion to highlight this important change in particular.

funds. Prior to its present response, petitioner particularly emphasized this linkage and insisted that it is the critical factor in deciding the limits of state obligations with regard to part IV-D standards. And, it is two of the three sections that delineate that linkage—namely, former § 602(a)(27) and former § 652(a)(4)—that have been so substantially revised in the Reconciliation Act as to render obsolete most of the discussion in petitioner's opening Brief concerning whether parts IV-A and IV-D, read together, create rights enforceable under 42 U.S.C. § 1983, and whether Congress nonetheless intended to supersede § 1983 in enacting those parts of the SSA. Pet. Br. at 12-23; *see* Motion at 1a-2a, 3a-7a.[6]

For example, petitioner's Brief states, at a critical juncture in its argument:

> Title IV-D's requirements for services are more like those at issue in *Suter* than like the measurable dollars in *Wright* or *Wilder*. Title IV-D requires only "substantial compliance" with its requirements. *42 U.S.C. § 602(a)(27).* [Pet. Br. at 14, emphasis supplied.]

Section 602(a)(27) was a provision contained *not* in part IV-D of the Social Security Act but in part IV-A of the Act, the part of the Social Security Act completely rewritten and fundamentally altered by the Reconciliation Act. The section provided that as a condition of obtaining funding for welfare benefits, states had to promise to have a part IV-D child support program, and to "operate . . . in substantial compliance with such plan." And, petitioner's central argument under the "existing framework" for deciding whether a plaintiff can file suit

[6] Additionally, the very fact that part IV-A was fundamentally altered so as to eliminate all individual entitlements and most federal standards while part IV-D was not so altered is of great significance in determining whether Congress understands part IV-D to create statutory rights in the individuals entitled to child support services.

under § 1983 was that the only *promise* a state was required to make was to operate in "substantial compliance" with the part IV-D plan, that such promises cannot be expanded by any process of implication, and that the "substantial compliance" promise is insufficient to give rise to an enforceable individual right. Pet. Br. at 13-15.

The Reconciliation Act, however, as part of its general complete overhaul of part IV-A, eliminates § 602(a)(27) entirely. In its place, it substitutes a new provision that continues to require as a condition of receiving funds for welfare assistance that the state have a part IV-D child support services program, but does *not* limit the obligation to operating in "substantial compliance" with that program. *See* Motion at 1a-2a.

To be sure, petitioner suggests that this critical change is of no moment because there remains in the Social Security Act, as amended, the term "substantially comply" with reference to part IV-D. Pet. Resp. at 7 & App. 1. But that same reference appeared in the earlier statute as well (compare former 42 U.S.C. § 603(h) with Reconciliation Act § 103(a)(1), adding 42 U.S.C. § 609(a)(8), *see* Motion at 3a-4a) and was not mentioned much less relied upon at the critical juncture in petitioner's brief quoted above. *See also*, relying on former § 602(a)(27) and not former 603(h), Pet. App. 14a (Ninth Circuit majority opinion) & 40a (dissent); Brief *amicus curiae* of National Council of State Governments, at 3, 5, 15, 18.[7] Under the "existing framework" established by the

[7] Former 42 U.S.C. § 603(h) and present 42 U.S.C. § 609(a)(8) both pertain not to the nature of the basic undertaking made by the states in obtaining funds for welfare benefits but, instead, to the quite separate question of determining when a monetary penalty should be applied to states for failure to operate in compliance with part IV-D standards. Petitioner relied on prior § 602(a)(27) and not prior § 603(h) because it was the former section, not the latter, that circumscribed the basic state plan promise made by states in accepting part IV-A funds.

Wilder/Suter analysis, the excision of the "substantial compliance" language from the description of the basic agreement entered into by the states on accepting part IV-A funds could change the doctrinal complexion of this case in a fundamental way.

Similarly, petitioner's Brief in this Court relies heavily on the former statute's audit provision, 42 U.S.C. § 652 (a)(4), in arguing that "Title IV-D's Comprehensive Enforcement Scheme Precludes Use of § 1983." Pet. Br. at 20; *see id.* at 20-23. As the Appendix to our Motion demonstrated, that provision has been entirely revised, and other provisions pertinent to the auditing role of the Secretary have been enacted. Motion at 3a-7a. While petitioner maintains that the essential characteristics on which she relied remain, one need only read the old and the new auditing provisions to conclude that the parties could reasonably dispute whether the Secretary has as extensive mandatory auditing obligations under the new statute as under the old. *See also* Pet. Resp. at 11 (arguing that the changes in the auditing procedures between the old and the new statute are so significant that "the compliance measurement [under the new statute] has not yet been developed," and that the Secretary will have to issue regulations doing so).

There may well be counter arguments to our interpretation of the significance of the replacement of § 602(a)(27) and § 652(a)(4). Indeed, we expect that in briefing the merits of the case, whether in this Court or in the courts below, petitioner will make such arguments, including the one suggested in its Response at 7 and at Appendix A, p. 1. But those new arguments will necessarily entail substantial revision of the presentations that were made in petitioner's opening Brief. For purposes of considering whether the Court should decide this case at this time, the important question is not who is right or wrong on the merits of this and other statutory questions posed by the Reconciliation Act but whether this Court,

without benefit of any courts of appeals' views after full briefing and argument or full briefing in this Court, should consider these intensely statutory-specific questions.

3. Jumping from one extreme to the other, Petitioner also argues that if the Court will not hear her "broad arguments" *now*, the Court should remand with direction that the entire case be dismissed as moot. Pet. Resp. at 10-12. This suggestion is meritless for two reasons.

First, this is a "court of review, not of first view." *Oklahoma Tax Commissioner v. Chickasaw Nation,* 115 S.Ct. 2214, 2219 (1995), quoting *Yee v. Escondido,* 503 U.S. 519, 535 (1992) (citation omitted). If there actually were a serious question as to whether the Reconciliation Act has mooted this case, that question would best be decided in the first instance by the lower courts. That is one of the main reasons for remanding a case in light of a new legal development. *See, e.g., Boston Firefighters Union v. Boston Chapter, NAACP,* 461 U.S. 477 (1983) ("we vacate the judgment of the Court of Appeals and remand for consideration of mootness in light of 1982 Mass. Acts. Ch. 190(a) 25"); *United States v. New Jersey State Lottery Comm'n,* 420 U.S. 371, 373 (1975) ("remand[ing] to Court of Appeals so that it may consider whether the case is now moot" in light of new legislation.); *Foley v. Blair & Co.,* 414 U.S. 212, 217 (1973); *Johnson v. New York State Educational Dept.,* 409 U.S. 75, 76 (1972).

Second, the Court's "established practice" is *not*, as Petitioner claims, to direct that cases be dismissed if an intervening legal change has occurred which has mooted some or all of that case. Rather:

> in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the

> judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully. [*Lewis v. Continental Bank Corp.*, 494 U.S. 472, 482 (1990).]

See also American Foreign Service Association v. Garfinkel, 490 U.S. 153, 161 (1989); *United States Dept. of Treasury v. Galioto*, 477 U.S. 556, 560 (1986); *Bryan v. Austin*, 354 U.S. 933 (1957) (per curiam) (remanding case after enactment of new statute so plaintiffs "may amend their pleadings . . . to set forth a cause of action based on the operation of the new Act.")

CONCLUSION

For the reasons stated in the Motion and in this Reply, the Court should take notice of developments after the Petition for Certiorari was granted and consider whether to remand this case or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
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BRIEF FOR RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

Additional relevant provisions of Title IV of the Social Security Act, 42 U.S.C. § 601 *et seq.*, and of Title 45, Code of Federal Regulations, are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

1. *Statutory Scheme*: (A) *Overview*: Title IV-D of the Social Security Act ("SSA") establishes a comprehensive federal program that provides federal funds to states to enable them to furnish child support enforcement services and sets criteria for how states must provide Title IV-D services. The program, established in 1975 and refined through increasingly specific provisions in numerous amendments since then, assures every child the "right to support, inheritance, and to know who his father is." S. Rep. No. 1356, 93d Cong., 2d Sess. 51 (1974).[1]

Congress mandates for participating states an obligation to "provide services relating to . . . the establishment,

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[1] The Title IV-D program was most recently refined and expanded by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996) ("Reconciliation Act"). Because this case involves purely prospective relief, the statutory provisions relevant to whether there is a cause of action under 42 U.S.C. § 1983 are those presently in effect. *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 247 (1982) (per curiam); *see also Landgraf v. USI Film Products*, —— U.S. ——, 114 S.Ct. 1483, 1499 n.23, 1501 (1994). And, any trial of this action is likely to focus on whether the IV-D program at that time complies with the federal requirements as then in effect.

Petitioner's Brief was filed before enactment of the Reconciliation Act and therefore relies upon statutory provisions that have been changed. Where that is the case, we point out the change. There are provisions in the Reconciliation Act that will become effective in the future. Where that is the case, we so note; otherwise, the Social Security Act provisions cited in the text are currently effective. Citations to the provisions of the Social Security Act, as amended by the Reconciliation Act, are to the United States Code section "as amended by 110 Stat. —"; all sections cited appear in 42 U.S.C. unless otherwise noted.

modification, or enforcement of child support obligations . . . to . . . each child" receiving certain forms of federally-funded assistance and to "any other child" for whom an application for services is filed. § 654(4)(A), as amended by 110 Stat. 2199; *see also* § 654(4)(B), as amended by 110 Stat. 2199. Families receiving welfare benefits are *required* to assign to the state any rights to child support from an absent parent, and to cooperate with the state in establishing paternity and obtaining support payments. § 602(a)(26).[2] *Any* family may obtain child support services, however, by applying and paying the requisite fees. § 654, as amended by 110 Stat. 2199. The federal government funds at least two-thirds of the cost of child support and related services provided by the states for "operation of the plan approved under . . . this title." § 655(a), as amended by 110 Stat. 2236. Title IV-D also allows states to retain most of the support collected for children who receive welfare benefits. §§ 657 & 658, as amended by 110 Stat. 2200-04.

(B) *Substantive Standards*: Title IV-D provides in many respects precisely how child support enforcement services funded by the federal government are to be delivered. For example, Title IV-D requires that participating states: allow paternity actions until a child's 18th birthday, § 666(a)(5), as amended by 110 Stat. 2227; intercept state income tax refunds to satisfy support orders, § 666(a)(3); determine whether persons receiving unemployment benefits owe child support and, if so, collect amounts due from the benefits, § 654(19); use a system detailed by the statute for treating voluntary acknowledgments of paternity as of the same effect as a judgment determining paternity, § 666(a)(5), as amended by 110 Stat. 2227-30;[3] provide for income

[2] The Reconciliation Act contains similar provisions, to become effective July 1, 1997 or in some instances earlier. 42 U.S.C. § 608, as amended by 110 Stat. 2135.

[3] The Reconciliation Act Amendments to this provision become effective on various dates. *See* Reconciliation Act § 395, 110 Stat. 2259.

withholding in all support orders in accord with detailed requirements, § 666(a)(1) & (b), as amended by 110 Stat. 2212-14; prohibit retroactive reductions in past-due support, § 666(a)(9); and provide for review of support orders at least every three years, § 666(a)(10)(B).

Additionally, the most recent amendments to IV-D, *inter alia*: add requirements, with specified timeliness mandates, for notices to individuals of events affecting their rights to child support and enforcement services, § 654(12), as amended by 110 Stat. 2205; *see also* § 654(25), as amended by 110 Stat. 2200; regulate in great detail the disbursement of child support collected, by mandating automated procedures, requiring disbursement "within 2 business days after receipt," and specifying that orders for withholding income must be transmitted "within 2 business days after receipt of notice of" the income source, § 657, as amended by 110 Stat. 2200-04, § 654b, as added by 110 Stat. 2207-09;[4] specify that states "shall respond within 5 business days to a request made by another State to enforce a support order," § 666(a)(14), as added by 110 Stat. 2222-23; and spell out mandatory expedited state procedures, without need for adjudication, for genetic testing, obtaining financial information, accessing information in state records, withholding income, securing assets, and increasing monthly support payments, § 666, as amended by 110 Stat. 2224-27.

In addition to spelling out in all these respects the precise nature of the child support enforcement program for which federal funding is available, Title IV-D also directs the Secretary of Health & Human Services ("the Secretary") to "establish . . . standards for State programs for locating absent parents, establishing paternity, and obtaining child support and [spousal] support" (§ 652(a)(1)), and specifically to include in those standards "time limits governing the period . . . within which a State must accept and respond to . . . requests to locate absent par-

[4] The effective date of new 42 U.S.C. § 654b is October 1, 1998. Reconciliation Act, § 312(d), 110 Stat. 2209.

ents, establish paternity, and initiate proceedings to establish and collect child support awards." § 652(h). Participating states must "comply with such . . . requirements and standards." § 654(13).

In response to the Congress' directive, the Secretary promulgated 45 C.F.R. Part 303, titled "Standards for Program Operations," which sets "[t]he standards for program operation which the IV-D agency *must meet*." 45 C.F.R. § 303.0 (emphasis added). To "ensure States provide necessary services on a timely basis" (54 Fed. Reg. 32,290 (August 4, 1989)), the regulations describe, for every IV-D required service, precisely how to accomplish the tasks at hand, in what order and within what time frames, usually in mandatory language and with respect to every case at the requisite stage of development.[5]

(C) *Funding and Enforcement*: Because the federal government pays most of the cost of the child support serv-

[5] For example, the Secretary's regulations prescribe that: *"For all cases* . . . the IV-D agency *must* attempt to locate all absent parents or sources of income and/or assets when location is necessary to take necessary action." 45 C.F.R. § 303.3(b) (emphasis added). If location efforts are unsuccessful, the agency *"must* . . . [r]epeat location attempts . . . either quarterly or immediately upon receipt of new information." *Id.* (emphasis added). If paternity has not been established, the agency *"for all cases . . . must"* provide an opportunity to voluntarily acknowledge paternity and, if necessary, establish paternity by legal process. 45 C.F.R. § 303.5(a) (emphasis added). *"For all cases"*, the agency then *"must* . . . [w]ithin 90 days of locating an absent parent or of establishing paternity, establish an order for support or complete service of process necessary to commence proceedings to establish a support order" and, if necessary, paternity. 45 C.F.R. § 303.4 (emphasis added), and *"shall"* petition courts to include medical support provisions in all orders for child support where the child does not have adequate private health insurance. 45 C.F.R. § 303.31 (emphasis added). For all IV-D cases in which a support order has been established, the child support agency then *"must* maintain and use" one of several available systems for enforcing the obligation. 45 C.F.R. § 303.6 (emphasis added).

These regulations are illustrative. There are many other regulations providing mandatory standards at a similar level of specificity, including similar, multiple time limits. *See* Appendix B.

ices program, it is of course concerned that the program operate as Congress has in such great detail directed. Consequently, as a "condition for Federal financial participation" in each state's child support services program, the federal government reserves the right, if the state "fails to comply with the terms and conditions . . . stated in [the] . . . statute or regulation[s], . . . assurance [or] application", to withhold payment of the federal IV-D funds temporarily or permanently, wholly or partially, and to "[w]ithhold further awards for the . . . program." 45 C.F.R. § 304.10, § 74.62. *See also* 57 Fed. Reg. 11,743 (March 22, 1996).

The SSA also requires that, to be eligible for federal financial grants for family assistance under Title IV-A of the SSA, 42 U.S.C. § 601 *et seq.* (formerly the Aid to Families with Dependent Children program), a state must submit "[a] certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D."[6] States found "not to have complied substantially" with the requirements of Title IV-D may be penalized by the Secretary through a graduated reduction of one to five percent of the part IV-A grant, thereby decreasing the amount of money available to the State for financially supporting needy families. § 603(h). The term "substantial compliance" is defined by § 603(h):

> [A] State which is not in full compliance with the requirements of this part shall be determined to be in substantial compliance . . . only if the Secretary determines that any noncompliance . . . is of a tech-

[6] 42 U.S.C. § 602(a)(2), as added by 110 Stat. 2114. This provision is effective July 1, 1997, or earlier if the state submits a new state plan under Title IV-A before July 1, 1997. The predecessor provision required that each State plan for part IV-A aid to needy families with children must "provide that the State has in effect a plan approved under Title D . . . and operates a child support program in substantial compliance with such plan." 42 U.S.C. § 602(a)(27).

nical nature which does not adversely affect the performance of the child support enforcement program.[7]

Additionally, with respect to paternity determinations, to be in "substantial compliance" for purposes of the Title IV-A penalty, a state must not only meet the various task requirements of the statute relating to paternity determination, but must also *succeed* in establishing paternity in a specified percentage of all cases.[8]

The statute also provides for federal reviews and audits of each state's child support services program. As presently in effect, the statute both directs the Secretary to conduct audits as "necessary to assure [states'] conformity with the requirements of [Title IV-D]" and mandates an audit every three years for the distinct purpose of determining for purposes of the IV-A penalty provisions "whether the actual operation . . . conforms to the requirements of this part." § 652(a)(4).[9]

2. *Proceedings*: This action was filed under 42 U.S.C. § 1983 by five Arizona mothers whose children are eligible for Title IV-D child support services. The plaintiffs brought their action on behalf of themselves, their children, and all others similarly situated. Jt. App. 5-6, 9, 12, 14, 15, 18. The defendant is director of the state agency

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[7] The 1996 Reconciliation Act contains substantially identical provisions in a section headed "Penalties." 42 U.S.C. § 609(a)(8), as amended by 110 Stat. 2145.

[8] 42 U.S.C. § 652(g), as amended by 110 Stat. 2232-33. The Reconciliation Act increased the final paternity establishment percentage from 75 percent to 90 percent, effective for calendar quarters beginning after August 22, 1996. 110 Stat. 2233.

[9] The Reconciliation Act revises the audit provisions, effective "with respect to calendar quarters beginning 12 months or more" after August 22, 1996. 110 Stat. 2234. The new audit provisions emphasize audits to review state accomplishments with respect to performance indicators, for financial purposes, for calculating incentive payments, and "for such other purposes as the Secretary may find necessary." §§ 652(a)(4) and 654(15), as amended by 110 Stat. 2233-34.

charged by Title IV-D with providing child support enforcement services.

The complaint alleges that plaintiffs properly applied for child support services and cooperated in full with the IV-D agency, but either never received the help in seeking child support they sought and were entitled to receive, or encountered lengthy, unexplained delays in taking steps such as locating the absent parent or instituting wage garnishment procedures, with the result that support due and collectible was not collected because the noncustodial parents left employment or disappeared in the meantime. Jt. App. 8, 10, 14-15, 17. The complaint further alleges that petitioner "regularly and consistently failed to" comply with 13 specifically enumerated provisions of the federal regulations that govern the order, timeliness, and methodology of the federal child support enforcement program. Jt. App. 37-38. According to the complaint, a report by the Arizona Auditor General supports these allegations, concluding that "[u]nless significant changes are made, literally hundreds of millions of dollars will continue to go uncollected and hundreds of thousands of Arizona parents and children will suffer the consequences." Jt. App. 30. Plaintiffs sought under § 1983 a declaratory judgment that petitioner had violated "substantive rights secured them by [Title IV-D]" and "corresponding equitable relief." Jt. App. 42.

The district court dismissed the complaint before petitioner filed an answer, on the ground that *no* relief under § 1983 is available to enforce the rights secured by Title IV-D. The Ninth Circuit reversed, "solely on the basis of our legal conclusion that a § 1983 action is available to class plaintiffs" but "express[ed] no opinion as to the appropriateness or inappropriateness of [any relief]." Pet. App. 36a. Judge Kleinfeld dissented. Pet. App. 36a.

SUMMARY OF ARGUMENT

I. Under this Court's cases, a federal statute creates "rights" within the meaning of § 1983 if it creates binding obligations, is not vague or amorphous, and is intended to benefit the plaintiffs. Petitioner concedes that SSA Title IV-D was intended to provide child support enforcement services for the benefit of eligible children and their families. As we show at pp. 9-27, *infra*, Title IV-D establishes unusually concrete, specific, and mandatory standards for states, creating binding obligations on the states regarding the use of federal Title IV-D matching and incentive funds. While petitioner suggests that the statute does not create § 1983 "rights" because it permits states to operate only in "substantial compliance" with the statutory requirements, that reading of the statute is simply wrong. And the argument that plaintiffs lack standing to bring this suit disregards the fact that the rights plaintiffs seek to enforce is a right to child support enforcement services, not a right to obtain child support payments. Finally, since Title IV-D does not provide for private enforcement at all, there is certainly no basis for concluding that Congress in enacting Title IV-D intended to replace the otherwise applicable remedy under § 1983 with a remedy under Title IV-D itself.

II. Petitioner suggests that this Court reconsider and overturn *Maine v. Thiboutot*, 448 U.S. 1 (1980) and hold that individuals no longer can enforce federal statutory rights under § 1983. As we show at pp. 28-44, *infra*, this issue is not properly before the Court; principles of *stare decisis* preclude reconsidering *Thiboutot; Thiboutot* in any event simply read § 1983 as written, as this Court's cases direct; and the legislative history of § 1983 upon which petitioner relies is much too ambiguous to justify disregarding the statutory language. Petitioner's alternative suggestion that § 1983 be limited to the protection of "rights" for which there is already a private enforcement mechanism would make the statute, heretofore thought of great important, essentially meaningless.

III. Finally, as we show at pp. 44-50, *infra*, petitioner's contention that this case is precluded by the Eleventh Amendment seeks the overruling, *sub silentio*, of this Court's cases squarely holding that cases for prospective relief against state officers for violation of federal statutory rights are not precluded by the Eleventh Amendment. And, although petitioner contends otherwise, *Seminole Tribe of Florida v. Florida*, 116 U.S. 1114 (1996) reaffirms rather than precludes the availability of such relief in federal court where, as here, there is a statute (here, § 1983) that expressly provides for actions against state officers.

ARGUMENT

I. TITLE IV-D CREATES IN ELIGIBLE CHILDREN AND FAMILIES A FEDERAL RIGHT TO SPECIFIC CHILD SUPPORT SERVICES ENFORCEABLE IN AN ACTION UNDER 42 U.S.C. § 1983.

Congress has painstakingly developed a nationwide, federal-state cooperative system—set out in Title IV-D of the Social Security Act—"[f]or the purpose of enforcing the support obligations owed by noncustodial parents to their children." 42 U.S.C. § 651. To assure this goal, Congress has committed large sums of federal funds and devoted careful attention to fine-tuning the system so that the child support enforcement services promised are actually delivered to each eligible child.[10] This suit, brought under 42 U.S.C. § 1983 on behalf of children eligible for Title IV-D child support enforcement services, alleges that petitioner, the state official in charge of the state's Title IV-D agency, is not abiding by certain of the federal requirements regarding the provision of Title IV-D services and, on that basis, seeks prospective relief mandating petitioner to conform to those legal requirements.

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[10] For the history of the Title IV-D program, *see generally* Brief Amici Curiae of National Women's Law Center, *et al.*

This Court has reiterated many times that 42 U.S.C. § 1983 "provides a federal remedy for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws'" and thus "provides a remedy 'against *all* forms of official violation of federally protected rights'" *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989), *quoting Monell v. Dep't of Social Services*, 436 U.S. 658, 700-01 (1978) (emphasis supplied). And, this Court has also consistently recognized that, as a general matter, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding . . . simply does not intrude on their sovereignty . . . . [T]he State ha[s] no sovereign right to retain funds without complying with those conditions." *Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983). Indeed, with regard to the Social Security Act and other cooperative federalism programs in particular, since *King v. Smith*, 392 U.S. 309 (1968) and *Rosado v. Wyman*, 397 U.S. 397 (1970), this Court has regarded it as "peculiarly part of the duty of this tribunal . . . to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use," *id.* at 422-23, and has done so often in cases brought under § 1983, *e.g. Wright v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418 (1987).

At the same time, while broadly applicable, § 1983 does not apply to *any* "violation[] of federal law," but only to violations of federal "rights." *Golden State*, 493 U.S. at 106. And, as the *Golden State* Court summarized the law:

> In deciding whether a federal right has been violated, we have considered whether the provision . . . creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst State School and Hospital v. Halderman*, [451 U.S. 1, 19 (1981)]. The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, [479 U.S. 418, 431-32 (1987)]. We have also asked whether the provision in question was "intend[ed] to benefit" the putative plaintiff. *Id.*, at 430 . . . . [493 U.S. at 106.]

See also Wilder v. Virginia Hospital Ass'n, 496 U.S. 498, 509 (1990).

1. Petitioner does not disagree that "[u]nder the existing framework" the factors listed in *Golden State* are the relevant factors for determining the existence of a "right" within the meaning of § 1983. Pet. Br. at 12. Yet, the subtext of petitioner's argument rests on two factors not listed in the *Golden State* summary: (1) that Congress did not expressly provide in Title IV-D itself for suits against state officials by the children protected by the statute if the services due are not provided; and (2) that this case concerns a statute enacted pursuant to Congress' powers under the Spending Clause. Pet. Br. at 10, 12.

Whether the statute giving rise to the "rights" in question itself provides for individuals to bring suit in federal court is not one of the factors listed in *Golden State* with good reason: Section 1983 is written in general terms, so as to be generally applicable to the enforcement of federal rights. Petitioner's suggestion that § 1983 applies only if Congress in the rights-creating statute states that a private enforcement action is available renders § 1983 nugatory. For the obvious point of writing a statute of general applicability is so that Congress will not have to restate the provisions of that statute again and again, but can legislate in the future on the understanding that the statute is in place and will apply.[11]

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[11] There are many examples of generally applicable federal statutes which by their terms serve as a backdrop against which Congress legislates, and which it would therefore be redundant to repeat each time Congress acts in an area affected by such statutes. *See, e.g.*, 1 U.S.C. §§ 1-6 (the Dictionary Act); 28 U.S.C. §§ 1251-59, 1291-95, 1330-67, 1391-1412, 1441-52, 1491-1509, 1581-85, 1602-

The National Labor Relations Act, for example, the statute enforced under § 1983 in *Golden State*, provides no cause of action against state officials for protection of the right to free collective bargaining rights created by the statute (or, for that matter, for protection of any other NLRA right). It is § 1983 that creates that cause of action, as *Golden State* held. The absence of a private enforcement action in Title IV-D itself, then, can be of more aid to petitioner here than such an absence was to respondent in *Golden State*.

Nor is there any basis for supposing that different principles for determining the availability of § 1983 actions pertain to cases such as *Golden State*, involving a federal statute enacted under the Commerce Clause, and cases such as this, involving a statute enacted pursuant to the Spending Clause. This Court has applied precisely the factors outlined in *Golden State* in both Spending Clause and non-Spending Clause cases in determining whether a federal constitutional or statutory provision gives rise to "rights" enforceable under § 1983. *See, e.g., Golden State*, 493 U.S. at 106 (a Commerce Clause statutory case relying on Spending Clause cases such as *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981)); *Dennis v. Higgins*, 498 U.S. 439, 448-49 (1991).[12]

11, 1631 (federal jurisdiction and venue provisions); 5 U.S.C. 500 *et seq.* (the Administrative Procedure Act); 5 U.S.C. § 552 (the Freedom of Information Act). The same is true of established common law rules. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994).

[12] We recognize, of course, that a special standard does apply with regard to Spending Clause statutes, applicable both in § 1983 cases and where the federal government enforces the states' obligations under such statutes itself—*viz.* that Congress must inform the states of their *obligations* under Spending Clause statutes "unambiguously." *Pennhurst*, 451 U.S. at 17. But this Court has made it clear that the *Pennhurst* clear statement principle applies only "in the context of imposing an unexpected condition for compliance —a new obligation for participating States," not where the concern

2. (a) Applying the *Golden State* criteria as the Court did enunciate them, petitioner concedes, as she must, that Title IV-D's child support services provisions were enacted and repeatedly strengthened primarily to benefit all the children and parents needing those services. Pet. Br. at 13. And, the present Congress, while overhauling the federal financial assistance programs so as to eliminate any entitlement to receive certain cash benefits, retained the explicit Title IV-D commitment to provide child support services to "each child" receiving Title IV-A financial assistance and to "any other child" on whose behalf such services are affirmatively sought, § 654(4), as amended by 110 Stat. 2199, as well as the federal commitment to pay, on a matching, uncapped basis, for the costs of doing so, § 655(a), as amended by 110 Stat. 2236.[13]

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is "with the remedies available against a noncomplying State." *Bell v. New Jersey*, 461 U.S. at 790 n.17, *see also Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 666 (1985). In the latter context, states, like other contracting parties, are necessarily on notice that traditional, generally applicable means of enforcing freely-assumed obligations will be available, and there is no need for *special*, additional notification in the particular Spending Clause statute at issue that a § 1983 action is available. *United States v. Texas*, 507 U.S. 529, 536, 538 n.6 (1993) (states which owe money to the United States pursuant to a Spending Clause statute must pay common-law prejudgment interest whether or not the statute being enforced so provides); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 74-75 (1992).

[13] The Reconciliation Act contains four sections declaring that *other* parts of the Social Security Act create no entitlement to benefits or services. § 601(b), as added by 110 Stat. 2113; § 608 (a)(7)(E), as added by 110 Stat. 2138; Reconciliation Act § 116 (b)(1)(C), 110 Stat. 2183; Reconciliation Act § 116(c), 110 Stat. 2184-85. An earlier version of the welfare reform bills considered b ythe 103rd Congress provided that "all entitlement of individuals to benefits established under the following programs . . . is terminated" including "the child support enforcement program under part D . . ." H.R. 4, § 302, 104th Cong., 1st Sess. (January 4, 1995). The final bill, however, contained no such provision with regard to the child support enforcement program. And, the 1996 Congress did revise and reenact § 654(4), the basic provision re-

(b) What petitioner does contend is that Title IV-D creates no " 'binding obligation' on the States that gives rise to [§ 1983] enforceable rights," *Wilder*, 496 U.S. at 510, on the theory that Title IV-D is similar to the statute held to create no § 1983 "rights" in *Suter v. Artist M.*, 503 U.S. 347 (1992). Pet. Br. at 13.

There is no resemblance between Title IV-D and the statutory provision involved in *Suter*, the Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U.S.C. §§ 620-28, 670-79a. In *Suter*, the Court rejected plaintiffs' effort to enforce the requirement that a state make " 'reasonable efforts' to maintain an abused or neglected child in his home," 503 U.S. at 359, on the ground that this requirement was insufficiently clear to create a binding obligation in light of the heightened notice of substantive obligations necessary in Spending Clause statutes.[14] The Court held that:

> No . . . statutory guidance is found as to how "reasonable efforts" are to be measured, . . . How the State

quiring that states provide the various child support services to the children who need them. Pp. 4-6, *supra*. This sequence confirms that the 1996 Congress regarded access to child support services as an "entitlement to . . . services."

[14] In addition to its "reasonable efforts" holding, *Suter* can also be read as ruling that requirements for assurances contained in state plan documents, common in Social Security Act provisions, do not carry with them any requirement that the assurances be fulfilled, and therefore are not enforceable. 503 U.S. at 358, 361. *Wilder* had held squarely to the contrary a few years earlier. 496 U.S. at 514 (declining to so read requirements of state assurances because doing so would "render the statutory requirements . . . meaningless").

Petitioner does not rely on the state plan aspect of *Suter*, and with good reason: Congress in 1994 specifically "overturned" *Suter* insofar as that case relied on grounds for denying the enforceability of requirements contained in state plan provisions "not applied in prior Supreme Court decisions respecting such enforceability," 42 U.S.C. § 1320a-2, and *Wilder* is obviously such a case. *see also* p. 33, *infra*; Pet. Br. at 14 n.4.

> was to comply with this directive . . . was, within broad limits, left up to the State. . . . The regulations promulgated by the Secretary do not evidence a view that § 671(a) places any [operational] requirement. . . . What is significant is that the regulations are not specific and do not provide notice to the States that failure to do anything other than submit a plan . . . is a further condition on the receipt of funds. [503 U.S. at 360-62.]

Title IV-D's basic provisions put at issue here, and the implementing regulations, by contrast, are cast in mandatory terms and set forth in exacting, concrete detail precisely who petitioner must provide with child support enforcement services, what services petitioner must provide, and when and how she must provide them. *See* pp. 4-6, *supra* & Appendices A and B.[15] Congress has, over the years, added to the specificity of the Title IV-D requirements and expressly directed the Secretary to do so as well, precisely to assure that the states are quite clear about their obligations and how to meet them. Pp. 4-6, *supra*.[16] In enacting Title IV-D and strengthening it

[15] These regulations are specifically mandated by statute (*see* 42 U.S.C. § 652) and adopted in accordance with the Administrative Procedure Act; accordingly, they have the "force and effect of law." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295-316 & nn. 18 & 19 (1979). These regulations, moreover, do not create additional obligations for states, but instead make specific the obligations imposed by statute by providing additional detail. They are therefore the type of regulations the Court always has considered in determining whether a State chose to take federal funds with "knowing acceptance," *Pennhurst v. Halderman*, *supra*, 451 U.S. 1, 17, of the terms of the funding. *See, e.g. Bennett v. Kentucky Dep't of Education*, 470 U.S. at 659-63, 665-66.

[16] We note that at this juncture this case does not raise any issue concerning the appropriate *remedy* should the numerous IV-D violations alleged be found to exist. P. 7, *supra*. It is worth noting, nonetheless, that, because of the very specificity of the statute and the implementing regulations, Judge Kleinfeld's fear (Pet. App. 37a) that the judiciary would have to develop standards for running Arizona's IV-D program if plaintiffs prevailed is unfounded. Rather, an appropriate remedy could simply incorporate the statu-

repeatedly, Congress was not merely making suggestions to, or nudging, or encouraging the states to provide the services specified in the manner described. *Compare Pennhurst*, 451 U.S. at 19; *Wilder*, 496 U.S. at 512. Rather, Congress delineated the states' obligations with unusual clarity in order to *assure* eligible children and families an effective, responsive program.[17]

(c) Despite these critical features of Title IV-D, petitioner maintains that this case *is* analogous to *Suter*, on the ground that Title IV-D "requires only 'substantial compliance' with its requirements," allows states to comply by serving not all eligible children but only 75 percent of those children, and therefore does not create "binding, individually enforceable obligations." Pet. Br. at 14, 15. This construction of the statute is premised in part upon a statutory provision with little current significance, and primarily upon a complete disregard of the quite ancillary role in the statutory scheme as a whole played by the special penalty for failure of "substantial compliance."

In support of her "substantial compliance" contention petitioner primarily invokes 42 U.S.C. § 602(a)(27), requiring that, as a condition of obtaining funds under Title *IV-A*, states must "provide that the State has in effect a plan approved under part D . . . and operates a child support program in substantial compliance with such

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tory and regulatory standards and require that Arizona meet those standards as long as the state receives IV-D funds. *Rosado v. Wyman*, 397 U.S. at 420.

[17] In *Pennhurst*, this Court relied upon the meager, spotty federal funding under the statute there at issue in concluding that Congress could not have intended to impose mandatory standards across-the-board. Title IV-D, in contrast, not only provides the majority of the funding for every service it requires the states to provide, but also establishes a reimbursement and incentive system under which many states come out with a net financial gain. *See* U.S. Department of Health & Human Services, Administration for Children and Families, *Child Support Enforcement: 19th Annual Report* (1994), Table 13 at 70, Table 23 at 80, Table 24 at 82, Table 32 at 89, & Table 34 at 91.

plan." This section has been superseded, as of July 1, 1997 or earlier for any states that submit new state Title IV-A plans before then. The replacement provision does not refer to "substantial compliance" or any similar concept. P. 6, *supra*.

That leaves exactly two continuing statutory references to "substantial compliance."

(i) The first of these "substantial compliance" references is in § 603(h) (carried over in the 1996 amendments to § 609(a)(8)), which, significantly, appears in Title IV-A, *not* in Title IV-D. That section provides that states found "not to have complied substantially" with the requirements of Title IV-D may incur a *penalty* through a graduated reduction of the state's *Title IV-A* grant.[18]

Cutting off Title IV-A funds used to provide subsistence support for needy children is an extreme measure, not lightly invoked. It therefore is not surprising that Congress imposed that special, draconian penalty only when a state's performance slips significantly below that expected, and used the term "compl[y] substantially" for the purpose—and only for the purpose—of describing the point at which those special penalties apply.

At the same time, the very wording of § 603(h) recognizes that Title IV-D *does* itself, quite independently of the linkage to Title IV-A, establish "requirements." It is those "requirements" themselves—and not mere substantial compliance therewith—that govern the states in the use of the quite separate federal funds *appropriated under Title IV-D* (as opposed to the funds appropriated to finance the related Title IV-A program). And, it is those requirements that provide perfectly clear notice to states of their "binding obligation", separately enforceable, in

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[18] Under the statutory scheme, the federal government is reimbursed for financial assistance payments from child support collected. By docking states not meeting the IV-D obligations contained in their IV-A grants, Congress is in effect recouping liquidated damages for welfare costs that could have been avoided.

expending *those* Title IV-D funds. §§ 654(4), (6), (12), (19), & (25), as amended by 110 Stat. 2199, 2200, 2205 (state plan must provide that the State will provide specified services to each qualified individual); § 655 (federal funds are paid "for the operation of the plan approved under section 654"); 45 C.F.R. § 304.10 (notifying states that "[a]s a condition for Federal financial participation," the provisions of 45 C.F.R. part 74 apply); 45 C.F.R. § 74.62 (providing the Secretary with remedies for material violations of the "terms and conditions" of any grant); 45 C.F.R. § 74.1 (45 C.F.R. part 74 applies to grants under specified "entitlement programs," including title IV-D); *see also* 45 C.F.R. § 74.1(a)(3), as amended Mar. 22, 1996; 45 C.F.R. § 304.20 (federal financial participation is available "for the support enforcement services . . . made pursuant to the approved title IV-D State plan"); *see also* Richard Cappalli, *Federal Grants and Cooperative Agreements*, § 1:13 at 26 (1982).

The Secretary's regulations relied upon by petitioner (Pet. Br. at 14) are fully consistent with this analysis of the relationship between the Title IV-D funding and operational requirements, on one hand, and the separate, additional Title IV-A penalty provisions on the other. There are distinct sets of regulations governing "Standards for Program Operations," 45 C.F.R. Part 303, and "Audit and Penalty," 45 C.F.R. Part 305. The former are mandatory and universal, requiring that prescribed steps be taken in "all cases." 45 C.F.R. § 303.3, 303.4, 303.5, 303.6. The latter trigger the special part IV-A penalty only if the audit sample shows noncompliance at a given level (75 percent for some title IV-D requirements and 90 percent for others). 45 C.F.R. § 305.20.

In promulgating and amending the audit and penalty regulations, the Secretary has been careful to explain the limited applicability of those regulations, and to remind the states that notwithstanding that substantial compliance on that special penalty limitation, they continue to have an obligation to provide the services prescribed in *all* cases,

not only in some of them. *See* 59 Fed. Reg. 66212 (Dec. 23, 1994) ("while the program regulations specify how States *must operate* IV-D programs . . . audit regulations specify those requirements which must be met in order for a State to . . . avoid fiscal penalties."); *see also, e.g.*, 49 Fed. Reg. 36773 (Sept. 19, 1984) (regulations should not be "construed to imply that it would be permissible for States to neglect or exclude certain cases or classes of cases"); *id.* at 36774 ("States are required to undertake to secure support and establish paternity in all cases").[19]

This Court addressed Spending Clause statutory scheme closely parallel to Title IV-D in *Bennett v. Kentucky Dept. of Education*, 470 U.S. 658 (1985), and concluded that the presence of a "substantial compliance" limitation only in a particular remedial part of a statute is not to be read into the definition of the statute's substantive obligation. *Bennett* involved state violation of a statute that provided federal funds as a supplement to, and not to "supplant", local educational funds. 470 U.S. at 660. Relying on *Pennhurst*, Kentucky argued that it did not accept Title I funds with "knowing acceptance" of the "supplanting" prohibition, because the statute only provided for prospective withholding of federal funds where

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[19] It is worth noting as well that the term "substantial compliance" as used in § 603(h) (and in its successor statute) is specifically defined in the statute:

> [A] State which is not in full compliance with the requirements of this part shall be determined to be in substantial compliance . . . only if the Secretary determines that any noncompliance . . . is of a technical nature which does not adversely affect the performance of the State's program operated under part D.

Entirely ignoring twenty-five percent of the eligible children certainly would "adversely affect the performance of the State's program." The Audit and Penalty regulations therefore, even if they were relevant here, cannot be understood as sanctioning the generic failure to provide services to such a large percentage of the case load. Rather, those regulations simply recognize that with respect to twenty-five percent of the sampled cases, technical defects—a few days delay in seeking a child support order, for example—will not result in invocation of the Title IV-A penalty.

there was a failure to "comply substantially." 470 U.S. at 663, 665.

The *Bennett* Court rejected the *Pennhurst* argument, holding that references to "substantial compliance" in certain remedial provisions does not affect the separate question whether there was a misuse of the federal funds such that the misspent funds could be recovered by the government. 470 U.S. at 663-64; *see also King v. Smith*, 392 U.S. at 317 (enforcing fully provisions of former Title IV-A while noting that the statute provided for termination of funding for failure to "comply substantially" with the statute in administering the state plan).

So here: That Congress limited one, special penalty for Title IV-D violations to instances of "substantial" noncompliance can not be read as an across-the-board *permission* to the states to violate the IV-D requirements some percentage of the time.

(ii) Section 652(g), the second reference to "substantial compliance," which does appear in Title IV-D, provides that states must *attain* a paternity establishment percentage of 90 percent (up from 75 percent in the pre-1996 statute), or must increase their paternity establishment percentage each year, in order to meet the § 603(h) substantial compliance standard. That provision cuts against petitioner, not for her.

The binding obligations under Title IV-D generally, and the § 1983 right plaintiffs seek to enforce, arise from the duty to provide child support services, *not* from any obligation in fact to establish paternity for any particular individual or in fact to obtain a child suport order or in fact to secure enforcement of such an order. In this respect, the obligation is similar to an obligation to provide legal or medical services; such an obligation obviously can be binding (on a doctor or lawyer who promises to provide the services in exchange for a fee) even though there is no assurance that any particular result will be obtained through the services.

The paternity determination "substantial compliance" provisions, however, go further than the remainder of Title IV-D and the regulations thereunder and turn on the achievement of *results*, not only on the provision of services. That results *are* measured, and at an "A-" level, simply shows how serious Congress is about assuring that the underlying services are actually provided at the intensity prescribed by the statute and regulations.[20]

(d) In an effort to put the § 1983 enforceable rights analysis outlined in *Golden State* to double duty, petitioner also contends that the interests respondents assert are " 'too vague and amorphous' to be judicially enforceable," Pet. Br. at 16, *quoting Wilder*, 496 U.S. at 509, and that respondents therefore do not have—or may not have—Article III standing to bring this suit.

In the first place, as we have shown, this case, in contrast with *Wilder* and *Suter*, does not involve obligations that are arguably "vague or amorphous" in the sense used in those cases—*viz*, in the sense that determining whether the obligation has been satisfied is beyond judicial competence. Title IV-D and its implementing regulations set forth a state's obligations in exacting detail. And, while petitioner makes a quasi-"vagueness" argument in contending that a state's obligation under Title IV-D is limited to "substantial compliance" with federal requirements, Pet. Br. at 16, we already have demonstrated that petitioner is mistaken in that regard. *See* pp. 14-20, *supra*.

In an apparent recognition of the weakness of her "vagueness" arguments, petitioner bridges from *Wilder* and *Suter* to the case law concerning a plaintiff's standing to sue under Article III. Pet. Br. at 16-19. But petition-

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[20] Similarly off base, and for similar reasons, is petitioner's argument that the financial incentives provided in the statute demonstrate that "Congress did not intend Title IV-D to impose binding, individually enforceable obligations." Pet. Br. at 15. The statutory incentive provision, 42 U.S.C. § 658, as amended by 110 Stat. 2231-33, again turns on the results obtained—the amount of child support actually collected—rather than on the services provided.

er's hint of an Article III standing argument is in reality quite independent of her argument that Title IV-D obligations are "vague" under the *Wilder/Suter* standard. And, to the extent petitioner *is* making such an *independent* claim about standing—*viz.* that Congress *cannot*, consistent with Article III, provide the custodial parents and their minor children with a cause of action to enforce title IV-D rights—her argument is meritless.

To satisfy Article III, a plaintiff in federal court need allege as an "irreducible minimum" that "there be (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers v. Brown Group*, —— U.S. ——, 116 S. Ct. 1529, 1533 (1996). Petitioner contends that respondents do not meet these minima because (1) their "true injury" is the "absent parents' failure (or inability) to take responsibility for their children," (2) she did not cause that "true injury, and (3) requiring that she provide the respondents with the child support services to which they are entitled will not necessarily result in the collection of child support and thereby redress that "true injury." Pet. Br. at 16.

But, as their complaint makes clear, respondents are not seeking in this lawsuit to compel petitioner to support their children. They are seeking the child support *enforcement services* to which they and their minor children are entitled. And "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975), *quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-212 (1972). "[T]he existence of such a [legal] right is, on the basis of our common-law traditions, entirely clear . . . when a statutory provision requires an agent of the executive to provide a particular benefit directly to a particular individual." A. Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 27 Suffolk L. Rev. 881, 885-86 (1983). Since the point of the complaint here is that Title IV-D requires petitioner to provide child support services directly to respondents, respondents have standing to complain that petitioner has not done so.

We acknowledge the possibility (greatly exaggerated by petitioner) that even if petitioner followed the designated procedures to the letter, child support still might not be collected. But that does not mean respondents suffer "no injury in fact" when the services are withheld.

In the first place, the services have real-world monetary value: People regularly hire and pay private attorneys to attempt (and sometimes fail) to collect child support. A custodial parent who seeks but does not obtain such services from the Title IV-D agency is therefore injured in a concrete, quantifiable way in the amount of the cost of obtaining those same services on the private market.

Second, many of the individual steps petitioner must take pursuant to Title IV-D, such as locating the absent parent, establishing paternity, and obtaining a support order, will benefit respondents' children even if support is not collected immediately. Congress sought in Title IV-D to protect a "child's right to . . . *inheritance*, and *to know who his father is.*" *S.* Rep. No. 1356, 93d Cong., 2d Sess. 51 (1974) (emphasis added). The injury caused by the denial of enforcement services to these children is "actual or imminent, not conjectural or hypothetical," and "concrete and particularized,"—"mean[ing] that the injury . . . affect[s] the plaintiff in a personal or individual way." *Lujan v. Defenders of Wildlife*, —— U.S. ——, 112 S. Ct. 2130, 2136 & n.1 (1992) (citations, internal quotation marks omitted).

Finally, even if the right to child support services were viewed as a purely "procedural" right—*viz.* of value *only* in advancing the concrete right to receive support—a plaintiff complaining about the denial of those services still would not have to demonstrate that child support

would have been collected to show an Article III "injury-in-fact." As this Court explained in *Lujan*, 112 S. Ct. at 2142 n.7 & 2143 n.8, procedural rights are "special" for purposes of Article III standing in that the plaintiff need show, for standing purposes, only that "the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." *Id.* Thus, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he *cannot* establish with any certainty that the Statement will cause the license to be withheld or altered." *Id.* (emphasis supplied). *See also Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297, 2301-05 (1993).

To be sure, petitioner would analogize this case to *Linda R.S. v. Richard D., supra,* in which the plaintiff sought to compel a state to criminally prosecute the father of her child for failing to pay support, and to *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), in which the plaintiffs sought to compel the head of the Internal Revenue Service to rescind a tax ruling regarding someone else.

But, as petitioner herself points out, in those cases the "plaintiff's asserted injury [arose] from the government's allegedly unlawful regulation (or lack of regulation) of someone else" and in such cases "standing . . . is ordinarily substantially more difficult to establish." Pet. Br. at 18 (emphasis removed), *quoting Lujan, supra,* 112 S. Ct. at 2137. That is so because in such cases the plaintiff is seeking government action in the general public interest of a kind that is peculiarly subject to prosecutorial discretion or public policy determination. The asserted injuries in *Linda R.S.* and *Simon,* moreover, were indirect—the plaintiffs claimed that, by acting unlawfully in regulating third parties, the government was causing the third parties to change their behavior, which in turn was causing injury to the plaintiffs—thereby creating a

question as to whether these injuries could be redressed in a suit against the government alone.

By contrast, the respondents here have alleged a *direct* "injury-in-fact" for which they seek redress. The statute requires that petitioner provide respondents with the very services that petitioner is not providing; respondents are entitled to those services; they are injured by the deprivation of those services, without regard to the ultimate impact on the non-custodial parent's actions; and ordering petitioner to provide the services as required would fully redress the injury alleged.

3. Once it is determined that a particular statutory scheme creates federal "rights," § 1983, by its terms, creates a cause of action that provides "an independent safeguard against deprivations of [such] federal . . . statutory rights." *Smith v. Robinson,* 468 U.S. 992, 1012 (1984). Congress does, however, with respect to any particular statutory right "retain[] the authority to repeal it or replace it with an alternative remedy." *Id.* Petitioner maintains that Title IV-D implicitly works such a repeal by providing for enforcement of its requirements by the Secretary through its audit and penalty provisions. Pet. Br. at 20.

It has long been a "cardinal rule" of statutory construction that "repeals by implication are not favored," and that implicit repeals are therefore found only if "the intention of the legislature [is] . . . clear and manifest." *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936). And, in the absence of any direct evidence of Congressional intent, an implied repeal will ordinarily be found only where "the provisions of the two acts are in irreconcilable conflict." *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 154 (1976); *see also United States v. Hansen,* 772 F.2d 940, 944 (D.C. Cir. 1985) (Scalia, J.).

Consistent with these implied repeal principles, this Court has repeatedly made clear that it will " 'not lightly conclude that Congress intended to preclude reliance on

§ 1983 as a remedy' for the deprivation of a federally secured right." *Golden State*, 493 U.S. at 107, *quoting Wright*, 479 U.S. at 423-24, *quoting Smith*, 468 U.S. at 1012. Rather, where, as here, there is neither an express repeal of § 1983 remedies in particular nor a general statement that the remedies included in the statute are exclusive, *compare Adickes v. S.H. Kress Co.*, 398 U.S. 44 (1970), "[t]he burden is on the State to show 'by . . . *specific evidence from the statute itself* that Congress intended to foreclose' a § 1983 action," *Wilder*, 496 U.S. at 520 (emphasis supplied).[21] An implied repeal of § 1983 will be found only where " '[a]llowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.' " *Golden State*, 493 U.S. at 107, *quoting Smith*, 468 U.S. at 1012.

In particular, this Court has *never found* such inherent inconsistency where, as here, the rights-creating statute provides *no* means of private enforcement whatever, administrative or judicial. Rather, from the time of *Rosado v. Wyman*, the Court has consistently been "reluctant to assume Congress has closed the avenue of . . . review to those individuals most directly affected." 397 U.S. at 420. *See Wright*, 479 U.S. at 427-28; *Wilder*, 496 U.S. at 522.

In the very few instances in which an implicit repeal of § 1983 has been found, the rights-creating statute *did* provide for private enforcement but with particular limitations, and the Court's conclusion was simply that the private enforcement scheme was sufficiently comprehensive that Congres could not have intended to permit evasion of the limitations through a suit under § 1983. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1 (1981) ("*Sea Clammers*")

[21] *Adickes* concerned in part whether the public accommodations title of the 1964 Civil Rights Act could be enforced under § 1983. 398 U.S. at 150 n.5. That title contained an express provision that its injunctive remedy was the "exclusive means of enforcing the rights based on this title." *Id.*

(no cause of action for damages under § 1983 where the rights-creating statute provides for individual judicial actions for injunctive relief only); *Smith v. Robinson, supra* (no § 1983 action with concomitant attorneys fees for prevailing plaintiffs where the rights-creating statute provides for private administrative and judicial enforcement but has no provision for collection of attorneys fees); *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (no § 1983 action without exhaustion of administrative remedies where habeas corpus, requiring such exhaustion, is available).

Petitioner cannot begin to demonstrate any fundamental inconsistency between private judicial actions under § 1983 and the enforcement scheme provided under Title IV-D. The auditing and penalty schemes provided under Title IV-D are essentially identical to those in *Wright* and *Wilder*. And both precedents hold such schemes to be insufficient to evidence a congressional intention to preclude all individual remedies. Petitioner attempts, it is true, to distinguish *Wright* and *Wilder* on the basis of minor differences between the details of the audit and penalty provisions in those cases and the one in Title IV-D. Pet. Br. at 20-21. Those cases do not, however, turn on small differences between one audit and penalty provision and another, but instead reject the conclusion, as the implied repeal principle required them to do, that audit and penalty provisions, standing alone, can be in "irreconcilable conflict," *Radzanower v. Touche Ross & Co.*, 426 U.S. at 154, with a private action for prospective relief under § 1983, at least where "the statute did not require, nor did [the auditing agency] provide, any mechanism for individuals to bring problems to the attention of [the agency]." *Wilder*, 496 U.S. at 522.[22]

[22] If small differences between one audit and penalty scheme and another *were* relevant, then the changes in the Title IV-D audit provisions made in the 1996 amendments (pp. 3-4, *supra*) would be pertinent, since they may eliminate the differences between the Title IV-D audit mechanism and those in *Wright* and *Wilder* on which petitioner relies.

II. THERE IS NO BASIS FOR ABANDONING THIS COURT'S WELL-CONSIDERED CONCLUSION IN *MAINE v. THIBOUTOT* THAT 42 U.S.C. § 1983 SHOULD BE CONSTRUED IN ACCORD WITH ITS PLAIN LANGUAGE TO REACH VIOLATIONS OF RIGHTS CREATED BY FEDERAL STATUTES.

Seeing an imminent checkmate, petitioner seeks to sweep all the chessmen off the table by calling for the overruling of *Maine v. Thiboutot*, 484 U.S. 1 (1980), in terms or in substance. Petitioner's maneuver is wanting in three regards: *Thiboutot* correctly interprets 42 U.S.C. § 1983; to the extent *Thiboutot*'s correctness is open to question, petitioner cannot come close to overcoming the *stare decisis* principles which weigh in favor of maintaining the *Thiboutot* interpretation of § 1983; and petitioner did not present any question going to *Thiboutot*'s correctness in her petition. After setting out the essence of the *Thiboutot* decision, we turn to these three points, taking the ones at the threshold first.

(a) The proposition that § 1983 provides a cause of action against persons violating under color of state law a plaintiff's federal statutory rights did not, as petitioner would have it, first emerge in *Thiboutot* as a creative judicial gloss on a one hundred year old statute, to "extend[] § 1983's reach." Pet. Br. at 30. Rather, *Thiboutot* simply read § 1983 as meaning precisely what the statute has always said. As the Thiboutot Court stated:

> The question before us is whether the phrase "and laws," as used in § 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act. [*Thiboutot*, 448 U.S. at 4.]

And, as *Thiboutot* also recognized, long before 1980 "any doubt as to [§ 1983's] meaning [was] resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Id.* (citing numerous cases). As *Thiboutot* emphasized as well, there were by 1980 numerous cases decided in this Court under the Social Security Act, the same statute underlying this case and *Thiboutot*, that necessarily "relied on the availability of a § 1983 cause of action for statutory claims." *Id.* at 5 (citing cases).

To be sure, in 1979 this Court's longstanding literal interpretation of § 1983 was disputed in a case on a related jurisdictional issue, with concurring opinions taking opposing views on the reach of § 1983. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 623 (1979) (Powell, J., concurring); *id.* at 646 (White, J., concurring). A few months thereafter, this Court granted *certiorari* in *Thiboutot* on the question that divided the *Chapman* concurrences. *Thiboutot* Pet. Writ of Cert. at 2. The parties and *amici* thereupon provided the Court with extensive commentary on the legal analyses and historical exegeses contained in the *Chapman* concurring opinions. *See Thiboutot* Briefs.

The upshot of this exceedingly careful two-stage consideration was a 6-3 decision in which the *Thiboutot* Court determined that the "[o]ne conclusion which emerges clearly is that the legislative history does not permit a definitive answer." 448 U.S. at 7. Finding no basis, let alone any compelling basis, for disregarding the statute's plain terms, the Court declined to go behind the statutory language, and regarded the argument for doing so as fundamentally one for the legislature:

> Petitioners' arguments amount to the claim that had Congress been more careful . . . it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983. [448 U.S. at 8.]

(b) The precedent-shattering question "whether *Maine v. Thiboutot* . . . should be reconsidered," Pet. Br. (i), discussed in petitioner's merits brief is not properly before the Court. The *certiorari* petition presented only a single,

considerably more modest issue, limited to the Title IV-D child support context and invoking rather than attacking "this Court's precedents." [23]

Whether to overrule a sixteen-year old decision, cited and applied in the very cases on which the petition relied, is not a question "fairly included" in the narrow question petitioner chose to raise. *See* Supreme Court Rules, Rule 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992). Nor does the petition in its body request the overruling of established law. Instead, both the petition and petitioner's reply concentrate exclusively upon why *this particular statute*—Title IV-D of the Social Security Act—should not be considered enforceable under § 1983. Neither document cites *Maine v. Thiboutot*, the foundation case petitioner now seeks to have "reconsidered," *at all.*

One carefully worded sentence in the petition can, in the fullness of hindsight, be seen as an attempt to protect petitioner's right to seek the overruling of *Thiboutot*. *See* Pet. at 7 ("The time has come for the Court to decide the general availability of § 1983 to enforce federal non-constitutional rights."). But since, as a general matter, this Court's *certiorari* procedures are intended to allow this Court intelligently to choose which issues it will entertain, a reference to an issue in the text of the petition, like any attempt to "smuggl[e] additional issues into a case . . . [on] certiorari," is not sufficient to bring before the Court a question not fairly included in the question presented. *Izumi Seimitsu v. U.S. Philips Corp.*, —— U.S. ——, 114 S. Ct. 425, 427 n.5, 428 (1993); *Yee v. City of Escondido*, 503 U.S. at 536.

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[23] "Whether custodial parents seeking child support from non-custodial parents can sue state officials under 42 U.S.C. § 1983 for alleged violations of Title IV-D child support program agreements between the States and the federal government when such suits will contravene this Court's precedents, not necessarily remedy a custodial parent's grievances, and violate core principles of federalism and separation of powers?" Pet. (i).

(c) If petitioner's merits brief question on *Thiboutot* is entertained, the considerations underlying *stare decisis* militate overwhelmingly against overruling or modifying *Thiboutot*'s reading of § 1983.

The last time this Court considered whether to abandon a long-established interpretation of the post-Civil War civil rights statutes, the Court's unanimous conclusion was that principles of *stare decisis* should prevail:

> [S]*tare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion." The Federalist, No. 78, p. 490 (H. Lodge, ed. 1888) (A. Hamilton). . . . [W]e have held that "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, [467 U.S. 203, 212 (1984)]. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. [*Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).]

(i) It is very much to the point—indeed, we believe it to be independently decisive—that the argument that *Thiboutot* should be overruled *has* been, repeatedly, "addressed to Congress," *Thiboutot*, 448 U.S. at 8, and that Congress has not only declined to "alter what [this Court had] done" but has taken actions that reaffirm the decision.

Hearings were held on the impact of *Thiboutot* in 1981, and bills were introduced to overturn the Court's interpretation of § 1983 on many occasions. H.R. 7686, 96th Cong., 2d Sess. (1980); S. 3114, 96th Cong., 2d Sess. (1980); S. 584, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 3209 (Feb. 26, 1981) (remarks of Sen. Hatch); Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Cong., 1st Sess. (1981); S. 81, 98th Cong.,

1st Sess. (1983); S. 436, 99th Cong., 1st Sess. (1985); S. 325, 100th Cong., 1st Sess. (1987).[24] That no statute limiting the application of § 1983 generally was enacted reflects "continued acceptance of [the] earlier holding" in *Thiboutot* and is entitled to "weight." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1981).

Even more significantly, since *Thiboutot*, Congress has enacted statutes specifically intended to assure that a cause of action generally lies under § 1983 for violations of rights created by federal statutes, including, in particular, the rights created by the Social Security Act.

First, a few months after *Thiboutot* was decided, Congress amended 28 U.S.C. § 1331 to provide for federal question jurisdiction without regard to the amount in controversy. Pub. L. No. 96-486, 94 Stat. 2369 (1980). In doing so, Congress specifically intended to provide federal jurisdiction over "challenges to state and local action violative of federal statutes and regulations" such as "*Chapman v. Houston Welfare Rights Organization* . . . ." S. Rep. No. 827, 96th Cong., 2d Sess. 5 & n.5 (1980); *see also* H.R. Rep. No. 1461, 96th Cong., 2d Sess. (1980).[25]

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[24] All of the Senate bills introduced in the 1980's would have amended § 1983 by striking "and laws" and substituting "and by any law providing for equal rights of citizens or of all persons within the jurisdiction of the United States." In introducing the 1981 bill, Senator Hatch discussed *Thiboutot* in detail, and asked Congress to act to overrule it. 127 Cong. Rec. 3209, 3212 (Feb. 26, 1981). At the Hearings in 1981, several witnesses noted the complexity of the issues raised by the proposal to overrule *Thiboutot*, objecting in particular to excluding cases brought to enforce rights under the Social Security Act, like *Thiboutot* and like this case, from the reach of § 1983. Hearings at 25 (remarks of Prof. Abernathy); *id.* at 38; *id.* at 48 (remarks of Prof. Steinglass); *id.* at 346 (remarks of Mr. Madden); *id.* at 405, 407, 408 (remarks of Prof. Friedman).

[25] *Chapman* was a case, like *Thiboutot* and this case, brought by individual beneficiaries claiming that the state was violating the Social Security Act in its administration of a program funded in part by the federal government under the Act.

Second, more recently, Pub. L. No. 103-382, § 555(a), 108 Stat. 4057-58 (1994) (codified at 42 U.S.C. § 1320a-2) was enacted to "assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*" 129 Cong. Rec. S.15942 (daily ed. Nov. 17, 1993); H.R. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994) (same explanation); *id.* at 923 (mentioning Title IV-D specifically); 140 Cong. Rec. S.15024 (daily ed. Oct. 8, 1994) (remarks of Sen. Rockefeller) (*Suter* "causes real concern" because it appeared to "eliminate[] an individual's right to sue to enforce provisions of . . . the Social Security Act"). *See* n.14, *supra*. Because the pre-*Suter* cases against states alleging violations of the Social Security Act (including *Thiboutot* itself) were brought under § 1983, Congress in enacting Pub. L. No. 103-382 was necessarily reaffirming *Thiboutot* at least with respect to cases enforcing the Social Security Act. This Congressional reaction to *Thiboutot* is alone sufficient to preclude the repudiation of that decision petitioners seek. *Hilton*, 502 U.S. at 202.

(ii) Putting Congress' reaction to *Thiboutot* to one side, *none* of the "compelling justification[s]" for a "depart[ure] from the doctrine of *stare decisis*" in the statutory context, *Hilton*, 502 U.S. at 202, are present here.

- *Thiboutot* was decided after an unusually "full airing of all the relevant considerations." *Monell v. Dep't of Social Services*, 436 U.S. 658, 710 n.6 (1978) (Powell, J., concurring).

- There is no tension among this Court's precedents concerning whether § 1983 provides a cause of action for enforcement of "rights" protected by federal statutes generally, absent a specific congressional determination otherwise with respect to a particular statutory right. No case of this Court either before or after *Thiboutot* has held that § 1983 does not so provide or is in any way in-

consistent with the basic holding of *Thiboutot*. *Compare Monell v. Dep't of Social Services*, 436 U.S. at 695-96 (overruling *Monroe v. Pape*, 365 U.S. 167 (1961) in part because cases holding school boards liable under § 1983 could not be squared with the rule of *Monroe* that governmental instrumentalities are not "persons" for purposes of § 1983); *id.* at 708 (Powell, J., concurring) ("[h]ere considerations of *stare decisis* cut in both directions"); *see also Director, OWCP v. Greenwich Collieries*, —— U.S. ——, 114 S.Ct. 2251, 2258 (1994).

• There is no basis, either for regarding *Thiboutot* as a "seriously flawed decision," *Hubbard v. United States*, —— U.S. ——, 115 S.Ct. 1754, 1758 (1995), or for invoking the "primary reason" relied upon in those few cases in which "statutory precedents have been overruled" —"intervening development[s] of the law . . . . [which] have removed or weakened the conceptual underpinnings from the prior decision," *Patterson v. McLean Credit Union*, 491 U.S. at 173. The key "conceptual underpinning" of *Thiboutot* is that a statute should be read as written. Since *Thiboutot* was decided, this Court has ever more emphatically reasserted the same principle, reiterating, in particular, that legislative history may not be used to override unambiguous statutory language, *e.g.*, *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991), and that it is improper because of the limited concerns expressed during the statute's enactment to read words of limitation into a statute that contains none, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985) (citation omitted) (" '[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' "). *See also Dennis v. Higgins*, 498 U.S. 439, 444 n.4 (1991) (specifically reaffirming *Thiboutot*'s refusal to ignore the language of § 1983 in favor of inconclusive legislative history).

• Finally, "[*s*]*tare decisis* has added force" here because overturning *Thiboutot* would "require an extensive legislative response." *Hilton*, 502 U.S. at 202. Congress has

heretofore necessarily enacted federal statutes against a background understanding that § 1983 provides for private actions for violations by state officials of federal statutory rights. Pp. 11-12, *supra*. If *Thiboutot* were overruled, Congress would have to revisit every rights-creating federal statute to consider whether specifically to provide anew for a cause of action to replace § 1983.

(iii) Ignoring all of these compelling considerations, petitioner's only submission in favor of abandoning *Thiboutot* is the assertion that the opinion has "spawned excessive litigation and . . . its standards have been utterly unworkable." Pet. Br. at 45. The evidence is to the contrary.

Thiboutot has generated less than ten cases raising questions concerning the application of that decision to particular statutory rights. During that same period, the Court has decided at least as many cases concerning the application of other federal statutory provisions with much narrower reach, including, for example, the pre-emption provisions of the Employees' Retirement Income Security Act ("ERISA"), 29 U.S.C. § 514(a). *See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, —— U.S. ——, 115 S. Ct. 1671 (1995) (citing some but not all of the ERISA preemption cases decided in this Court since 1980). And, the issues that arise in applying § 1983 to statutory rights have not proved any more complex than those that arise in applying § 1983 to cases that even petitioner concedes are within the statute—those that involve *constitutional* rights.[36]

In reality, petitioner's complaint is with § 1983 as written, not with *Thiboutot* or its progeny—which, after all, neither add to nor detract from the statutory text. Com-

[36] *E.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987) (immunity from damages; *Pembaur v. Cincinnati*, 475 U.S. 469 (1986) (whether activity rises to the level of custom or policy); *Sandin v. Conner*, —— U.S. ——, 115 S.Ct. 2293 (1995) (prisoner access to courts).

plaints that a statute is difficult to apply to particular situations because of thorny interpretive issues inherent in its language or the need to reconcile one statute and a related one have never been thought a basis for judicially invalidating statutes' plain words by simply declaring the offending statutes "puzzles," Pet. Br. at 46, and refusing to enforce them.

(d) The final *stare decisis* consideration is whether the case sought to be overruled "beyond doubt . . . misapprehended the meaning of [§ 1983.]" *Monell*, 436 U.S. at 700 (citation omitted). Given the complete surveys of the legislative materials in *Chapman* and *Thiboutot*, we do not propose in addressing that question to burden the Court by revisiting yet again all the materials that pertain to the question whether there is, as petitioner maintains once more, some basis for converting the word "laws" in § 1983 to "laws providing for equal rights." Pet. Br. at 37-43. Rather, we suggest that stepping back from the details of the historical materials to consider their implications confirms that *Thiboutot* was, in light of the ambiguity of the historical record, not wrong at all, but quite correct in declining to engraft words onto the statute that do not appear in it.

First, petitioner's argument against *Thiboutot* begins from the premise that "[w]hen a statute's text is ambiguous, courts should construe the statute in light of its manifest purposes." Pet. Br. at 42. That this statute's text is *not* ambiguous was the central basis for the holding in *Thiboutot*. "Laws" are "laws," not some laws or certain laws. And the terms "Constitution" and "laws," used together and conjunctively in § 1983, also appeared together and conjunctively—long before they appeared in the Revised Statutes in 1874—in the Constitution, in statutes, in commentary on the Constitution, and in this Court's early cases.[27] In all of these uses, there was no

[27] *See* Const. art. III, § 2 (delineating the federal judicial power); art. VI, cl. 2 (the Supremacy Clause); Act of Feb. 13, 1801, § 11, 2 Stat. 89, 92 (providing for federal question jurisdiction by using the phrase "constitution and laws"), repealed by Act of March 8, 1802, § 1, 2 Stat. 132; The Federalist No. 80 at p. 539 (J. Cooke ed. 1961); *see also* The Federalist No. 78 at p. 529 (J. Cooke ed. 1961); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819) ("the constitution and the laws made in pursuance thereof are supreme"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391-92 (1821).

implied limitation on the word "laws," and none has since been implied into Article III, the Supremacy Clause, or the federal jurisdictional provisions since enacted using the same phraseology, *e.g.*, 28 U.S.C. § 1331.

Second, a central prong of petitioner's historical analysis (and of the concurring opinion's analysis in *Chapman*, 441 U.S. at 638, and the dissenting opinion's analysis in *Thiboutot*, 448 U.S. at 117-19) is that Congress in 1874 could not have meant to alter the meaning of the predecessor statute from which present § 1983 was drawn, which provided only for causes of action for rights secured by the Constitution, because the 1874 revision was not intended to make any changes in the law. Pet. Br. at 40-41.

The short—but complete—answer is that on any theory, the 1874 revision amended the 1871 Civil Rights Act by adding, at a minimum, rights "secured by [some] laws," (those providing for "equal rights") to the constitutional rights actionable under the 1871 provision. More generally, this Court has recognized that the 1874 revision did not always meet its expressed goal of simply reenacting the prior law. Rather, as *United States v. Price*, 383 U.S. 787, 803 (1966) notes, the revision did, with some frequency, "broaden[]" prior law, yet in doing so linked the "substantial change . . . effected . . . with the customary stout assertions of the codifiers that they had merely clarified and reorganized without changing substance." So recognizing, the Court from the first declined to go behind the 1874 revision where the revision in itself is quite clear, since to do otherwise would undermine the goal of the revision. *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899) ("If the language of the revision be plain upon its face, the person examining it ought to be

able to rely upon it. If it [the revision] be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."); *see also id.* (citing cases), *see particularly United States v. Hirsch,* 100 U.S. 33 (1879) (revised statute punishing conspiracies to defraud generally is not restricted by the pre-revision statute which was limited to revenue law conspiracies).

Third, petitioner's argument is based on a hypothesis about what Congress must have intended in 1874, *viz.*, that § 1983 was intended to parallel present 28 U.S.C. § 1343(a)(3), which provides jurisdiction only over causes of action for rights secured by the Constitution or "any Act of Congress providing for equal rights." Pet. Br. 42-43. But the legislative materials generate at least two other, equally likely hypotheses.

(i) The term "and laws" could have been included in an effort to conform a number of related statutes with varying coverage.

Section 1343(a)(3) derives from two *different* 1874 jurisdictional provisions, one of which—covering the circuit courts, then trial courts—had the equal rights limitations, and the other of which—covering the district courts—did not. Pet. Br. App. 9-10. The failure in 1874 to provide full access to the circuit courts for all cases within present § 1983, at a time when all such cases *were* otherwise adjudicable in the federal courts, is certainly not particularly noteworthy, let alone such an oddity as would justify departure from the plain language of § 1983. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).[28]

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[28] It was the 1911 Congress, not the 1874 Congress, that, in eliminating the trial jurisdiction of the circuit courts, transposed the limitation on "laws" to the district court jurisdictional provision in § 1343(a)(3). Thus, from 1874 to 1911, there was jurisdiction in the district courts over every case within the literal terms of present § 1983; if the divergence between the substantive and jurisdictional provisions makes less than perfect sense, that is a divergence caused by the 1911 Congress, not by the 1874 Congress that enacted § 1983. And, what the 1911 Congress did in § 1343(a)(3) has no bearing on the intent of the 1874 Congress in drafting the entirely separate provision at issue here, § 1983. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991); *United States v. X-Citement Video, Inc.*, —— U.S. ——, 115 S.Ct. 464, 471 n.6 (1994).

At the same time, the substantive coverage of the civil rights laws was, by 1874, in some disarray. Present 18 U.S.C. § 242 began life, as did § 1983, as part of the Civil Rights Act of 1866, Pet. Br. App. 2-3; *see United States v. Price,* 383 U.S. at 302. Present 18 U.S.C. § 241 was added in the Enforcement Act of 1870, 16 Stat. 140. The revisers were faced with three different *substantive* statements of the reach of the protections accorded by the civil rights acts: The pre-1874 version of § 242 provided criminal sanctions for deprivation of equality by persons acting under color of state law, but only as to the rights secured by the civil rights statute itself (16 Stat. 144); the pre-1874 version of § 241 provided criminal penalties for any criminal conspiracy to interfere with rights protected by both the "Constitution" and "laws" (16 Stat. 141); and the civil "under color of state law" section added in 1871, present § 1983, reached rights protected by the Constitution, but said nothing about any laws. The revisers could well have viewed this diversity in coverage as precisely the sort of " 'contradition' ", Pet. Br. at 40, they were supposed to eliminate, and, acting on that view, conformed all three sections to the broadest of the three statutes, present 18 U.S.C. § 241. And, since the two criminal sections, one of the two jurisdictional sections, and the civil section *all*, as revised in 1874, applied to rights protected by "laws" without limitation, "if there was a slip of the pen [in 1874], it is more arguable that the mistake occurred" in the circuit court jurisdictional provision than in § 1983. *Chapman,* 441 U.S. at 669 (White, J., concurring). One mistake is surely more likely than four.

(ii) The term "and laws" could have been added to clarify that § 1983 protects federal rights "secured by" the Supremacy Clause.

This Court has noted that, considered independently, the phrase "rights . . . secured by the Constitution" "can be fairly read to describe rights secured by the Supremacy Clause," since "that Clause . . . does 'secure' federal rights by according them priority whenever they come in conflict with state law." *Chapman*, 441 U.S. at 612-13; *see also Golden State*, 493 U.S. at 107. The reference to the Constitution also can be read as excluding Supremacy Clause claims, even where federal statutory rights are involved. *Chapman*, 441 U.S. at 614-15.

It appears that the 1874 revisers were aware of that ambiguity. *See* Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose 362 (1872), *quoted in Chapman*, 441 U.S. at 631-32 (Powell, J., concurring) (noting that while Congress may have intended to include rights protected by statute in § 1 of the 1871 Civil Rights Act, courts might determine that "only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were . . . intended"). Consequently, in adding "and laws" to present § 1983 at the time of the revision, the revisers, and Congress, could well have concluded that they were only clarifying the intention of the original civil rights act Congresses to include rights "secured by" the Supremacy Clause in the sense discussed in *Chapman*, and were not adding to the 1871 Act at all.[29]

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[29] That *Chapman* and *Golden State* later concluded that the term "Constitution" as used in the 1874 revision of the civil rights acts did not include Supremacy Clause claims is fully consistent with this hypothesis: Precisely *because* the revisers determined for clarity to spell out whether and to what degree Supremacy Clause-secured statutory rights were included in each of the civil rights statutes, after 1874 the civil rights statutes must be read as including Supremacy Clause cases only to the degree specified by the reference to "laws" in the particular statutory provision.

The foregoing foray into competing historical hypotheses, we submit, amply supports *Thiboutot*'s determination that the "[o]ne conclusion that emerges clearly is that the legislative history does not permit a definitive answer." 448 U.S. at 7. Because that is the case, there would be absolutely no basis for upsetting *Thiboutot*'s plain words construction of § 1983 even if the other *stare decisis* considerations were less formidable.

(e) In addition to rearguing the very issues covered in *Thiboutot*, petitioner proposes a second theory for overruling its holding—*viz.* that a right is "secured" by a federal law within the meaning of § 1983 only if that other law expressly provides some private cause of action. Pet. Br. at 36. This suggestion is trebly flawed.

First, the premise of petitioner's "secured by . . . law" argument—that determining the application of § 1983 is analogous to deciding when to permit enforcement of an *implied* private cause of action, Pet. Br. at 31—is simply wrong. Section 1983 quite explicitly provides a "source of *express* congressional authorization of private suits," *Sea Clammers*, 453 U.S. at 19, presumptively applicable, for all the reasons just canvassed, to all suits against state actors alleging violation of rights secured by federal law.[30] For the judiciary to create by implication causes of action for which Congress did *not* explicitly provide raises a separation of powers question. *E.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102-05 (1991); *Wilder*, 496 U.S. at 508 n.9. Where, however, Congress *does*, as in § 1983, explicitly provide in a delimited class of cases for a generic cause of action enforcing federal rights, the separation of powers concerns cut in the opposite direction. It is the courts' responsibility to enforce *any* statute providing a cause of action, including a generic one, rather than to insist that having created the cause of action once Congress

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[30] There is no such generic federal cause of action where the violation of federal rights does not occur "under color of state law."

must do so twice or the courts will not abide by Congress' announced intention. *See Wilder*, 496 U.S. at 508 n.9; *see also, e.g., United States v. Locke*, 471 U.S. 84, 95 (1985).

Second, petitioner proposes, nonetheless, that Congress intended in enacting § 1983 to provide a cause of action only where Congress also provides for individual private suits specifically with regard to the particular right enforced, on the supposition that "[a] statute can hardly be said to 'secure' a 'right' to a 'person' if that person cannot sue under the statute." Pet. Br. at 35.

This Court, however, has consistently interpreted "secured" as used in § 1983 as a substantive rather than a procedural, litigation-oriented term. As the *Chapman* Court noted, 441 U.S. at 613 n.29: "The preamble of the Constitution, proclaiming the establishment of the Constitution in order to 'secure the Blessings of Liberty', uses the word 'secure' in the sense of 'protect' or 'make certain'." This Court has routinely used the word in that substantive sense when referring to § 1983. *See, e.g., Golden State*, 493 U.S. at 111. And the statutory context and history confirm that § 1983 uses the word "secured" with precisely that meaning.

The Civil Rights Act of 1866, for example, from which § 1983 was derived, provided first, in § 1, that all citizens have "the same [specified] right[s] . . . as . . . enjoyed by white citizens" and then separately, in § 2, for criminal penalties for "any right secured . . . by [the first section of] this act." Pet. Br. App. 3.

Similarly, the direct predecessor of § 1983, § 1 of the 1871 Ku Klux Klan Act, 17 Stat. 13, provided a civil cause of action for deprivation of "any rights, privileges, or immunities secured by the Constitution of the United States." *No* section of the Constitution, including the Fourteenth Amendment, makes any express provision for private enforcement or otherwise "secures" rights in the litigation-centered sense petitioner posits. Yet, "the 'prime

focus' of § 1983 and related provisions was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto. . . .'" *Dennis v. Higgins*, 498 U.S. at 444-45; *see also, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (remarks of Sen. Trumbull); *id.* at 1151 (remarks of Rep. Thayer); Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871) (remarks of Rep. *Shellabarger*) (all making clear that the drafters of both the 1866 and 1871 Acts saw the key role of both the 1866 and 1871 civil rights act to be to provide a means, first criminal and then civil, of enforcing those rights secured by independent substantive provisions). The 1874 revision followed this same basic structure and usage.

Finally, § 1983 has always been recognized as "an important part of the basic alteration in our federal system wrought in the Reconstruction era." *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). Yet, under petitioner's thesis, § 1983 would not reach *constitutional* rights, much less its present range of statutory rights.[21] Petitioner's recast § 1983 would be a "derelict on the waters of the law," *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting), no longer fulfilling its "very purpose . . . to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from

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[21] While petitioner suggests that implied actions under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) could fill the void with respect to constitutional actions, this Court has never had to address the question whether there is an implied private constitutional action against state officers similar to the one created in *Bivens* against federal officers. Rather the Court has always understood that § 1983 expressly provides a cause of action for such situations. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977); *Monell*, 436 U.S. at 712-13 (Powell, J., concurring). Indeed, if an *express* enactment providing a cause of action is not sufficiently clear to provide a private cause of action against state actors, it is difficult to see how an implied cause of action under *Bivens* could lie.

unconstitutional action under color of state law," *id.* at 242.[32]

III. THE ELEVENTH AMENDMENT DOES NOT BAR THIS SUIT TO COMPEL A STATE OFFICIAL'S FUTURE COMPLIANCE WITH TITLE IV-D.

Petitioner's final argument asserts that the Eleventh Amendment bars this suit, even though it is a suit not against the state but against a state officer for purely prospective relief. Pet. Br. 23.[33] While petitioner does not so acknowledge, her Eleventh Amendment argument just as squarely calls for the overruling of *Edelman v. Jordan*, 415 U.S. 651 (1974), and its progeny as her § 1983 argument does of the *Thiboutot* line of cases.

1. As a case against the petitioner, the Director of Arizona's Title IV-D agency, not against Arizona, seek-

[32] The Court should also reject the contention of *amici* Council of State Governments, *et al.*, at 6-7, that the 1871 Congress would not have understood programs like Title IV-D to create enforceable rights in their beneficiaries because third party beneficiaries generally could not enforce contracts at the time. Aside from the question whether speculation about what the 1871 Congress would have thought about modern federal-state entitlement programs like Title IV-D has utility, *amici* misstate legal history. The modern trend to allow a third-party beneficiary to recover under law on a contract began in this country well before the 1870's, as exemplified by the New York Court of Appeal's landmark decision in *Lawrence v. Fox*, 20 N.Y. 268 (1859); *see also* W.W. Story, *A Treatise on the Law of Contracts* 550 (1854) (*amici* cite the 1844 Story treatise; *Thredgill v. Pintard*, 53 U.S. (12 How.) 24 (1851); *Second Nat'l Bank v. Grand Lodge*, 98 U.S. 75 (1878); *see generally* Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 Harv. L. Rev. 1111 (1985). The most that can be said about the state of the law on this point in 1871 is that it was in flux.

[33] Petitioner correctly points out that an Eleventh Amendment argument was raised in *Sea Clammers* but because the argument was "not 'within the scope of the question on which review was granted' . . . the Court did not consider" the argument. Pet. Br. at 23, *quoting Sea Clammers*, 453 U.S. at 8 n.12. The Eleventh Amendment issue is equally outside the question presented by the petition in this case. *See* pp. 29-30, *supra*.

ing to require the petitioner to administer Arizona's IV-D child support services program in the future in conformity with federal law, this case fits comfortably within this Court's venerable line of cases beginning with *Ex parte Young*, 209 U.S. 123 (1908), holding suits against state officers for violations of federal law not barred by the Eleventh Amendment.[34]

The *Ex parte Young* doctrine was "the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Pennhurst State School & Hosp. v. Halderman* ("*Pennhurst II*"), 465 U.S. 89, 105 (1984) (citation omitted). The doctrine has been repeatedly reaffirmed in recent years as a "reconcil[iation] of competing interests" that is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" *Pennhurst II*, 456 U.S. at 106, 105, *quoting Young*, 209 U.S. at 106; *see also Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.").

Most recently, this Court in *Seminole Tribe of Florida v. Florida*, —— U.S. —— 116 S. Ct. 1114 (1996), twice emphasized that in those instances in which the Eleventh Amendment would bar suit against the state itself, to "ensur[e] the States' compliance with federal law . . . an individual can bring suit against a state official to ensure that the officer's conduct is in compliance with federal law, *see, e.g., Ex parte Young*. . . ." 116 S. Ct. at 1131 n.14; *see also id.* at n.16 (same).

Equally to the point, *Edelman v. Jordan*, *Quern v. Jordan*, 440 U.S. 332 (1979) and *Green v. Mansour*

[34] The doctrine that suits against state officers do not necessarily raise the same sovereign immunity concerns as suits directly against the state has roots that go back long before *Ex Parte Young*. *See generally* Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 3-4 (1963).

were all "*Thiboutot*-type" cases (Pet. Br. 23), brought, like this case, under § 1983 to enforce individual rights under the Social Security Act. All three cases emphasized that suits against state officers under § 1983 to compel their future compliance with federal laws are not barred by the Eleventh Amendment:

> In *Edelman* . . . . we . . . pointed out that under the landmark decision in *Ex Parte Young*, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. . . . The distinction between that relief permissible under . . . *Ex Parte Young* and that found barred in *Edelman* was the difference between prospective relief on the one hand and retrospective relief on the other. [*Quern*, 440 U.S. at 337.]

See also Green, 474 U.S. at 68. And, this Court has repeatedly recognized that as long as any impact on the state is "the necessary result of compliance with decrees which by their terms [are] prospective in nature", the fact that "[s]tate officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct" does not affect the courts' jurisdiction over those state officers in cases brought under § 1983 for violations of federal law. *Edelman v. Jordan*, 415 U.S. at 668; *see also Papasan v. Allain*, 478 U.S. 265, 278 (1986), *citing Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977); *Pennhurst II*, 465 U.S. at 105.

2. There is no basis for distinguishing *Edelman* from this case. As the executive official with overall responsibility for the relevant state agency—like the defendants in *Edelman* and *Quern*—petitioner is properly sued in her official capacity for the violations alleged in the complaint here. *See Papasan v. Allain*, 478 U.S. at 282 n.14.

The conclusory statement that "the state is the real, substantial party in interest" here, Pet. Br. at 25, *quoting Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 463-64 (1945), is certainly not a basis for distinction. *Ford Motor Co.* was an action "in essence . . . for the recovery of money from the state." 323 U.S. at 464. As *Edelman* makes clear, it was only because *Ford* was on the other side of the line between retrospective and prospective relief that governs in *Ex Parte Young* cases that the state in that case was the "real, substantial party in interest." 415 U.S. at 668.[35]

2. Petitioner adds to her constitutional Eleventh Amendment argument the statutory argument that even if a state officer *Ex Parte Young* action would be constitutionally proper here, under *Seminole* Title IV-D must be construed as not permitting such an action. Pet. Br. at 26-30, relying on *Seminole*, 116 S. Ct. at 1132-33. *Seminole* was not a § 1983 action, however, and the discussion in that case of the limitations on *implying* the availability of an *Ex Parte Young* suit have no application here.

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[35] If anything, this suit implicates the state's governmental interests *less* than do most suits against state officers for prospective relief under *Ex Parte Young*. Plaintiffs are not challenging any of the state legislative or administrative rules that pertain to the Arizona Title IV-D child support program. Rather, plaintiffs contend only that petitioner has not enforced those laws in a manner complying with Title IV-D and its implementing regulations. Compliance with the federally-imposed requirements for what services must be provided, when, and to whom, can often be achieved through more effective, rather than more expensive, means of delivering Title IV-D child support enforcement services. And the experience of other states is that the Title IV-D financing scheme can result, with effective management, in a *net financial surplus* for the state.

We note once again that this case was dismissed at the pleading stage and raises no relief issues. Concerns about what relief *might* be granted if the case goes forward (Pet. Br. at 25) are not an appropriate basis for dismissing an otherwise proper lawsuit; there will be time to litigate the propriety of the relief should the excesses petitioner fears occur.

The plaintiff in *Seminole* attempted to sue Florida and its governor under the civil suit provision of the Indian Gaming Regulatory Act (IGRA). The IGRA provides that a tribe may sue a state in federal court to require the State to "negotiate with the . . . Tribe in good faith" on a "compact" governing how the tribe may administer certain types of gaming (slot machines, casino gambling, etc.). As here pertinent, this Court held in *Seminole* that while Congress certainly can authorize suits against state officers for violation of federal law, the IGRA provided no such express authorization and, in light of the detailed remedy that statute did provide, that no cause of action against state officers should be *implied*. 116 S. Ct. at 1132-1133 & n.17.

This case, however, in contrast to *Seminole*, *was* brought under § 1983.[36] And, unlike the IGRA, § 1983 provides an *express* cause of action against persons acting "under color of [state law]", a phrase always understood as applying *principally* to cases against state officers for violations of federal law. *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 723 (1989) (the 1871 statute from which § 1983 was derived "was designed to expose state and local officials to a new form of liability" (citation omitted) and to provide federal jurisdiction over such cases). The question addressed in *Seminole* concerning whether to imply a state officer action simply does not arise in suits that, like this one, are properly brought under § 1983.

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[36] No cause of action under § 1983 was, as far as we can determine, asserted in *Seminole*, none was mentioned in the *Seminole* opinion, and it is far from clear given the particular statute and parties that such an action was available. Further, in discussing the reasons for limiting *Ex Parte Young* actions where Congress has not provided for one and does provide a detailed remedial scheme, *Seminole* relied on *Schweiker v. Chilicky*, 487 U.S. 413, 423 (1988), a case concerning the limitations on *implying Bivens* causes of action under the Constitution where Congress has provided a limited enforcement scheme, *not* on *Sea Clammers* or any other § 1983 case.

Moreover, if the *Seminole* standard for deciding when detailed Congressional remedies preclude the availability of *Ex parte Young* actions *is* intended to apply to § 1983 cases, then it serves *exactly* the same purpose as—and, by a parity of reasoning, must be identical in its content to—the standard established in *Sea Clammers* for deciding when Congress has decided to supersede § 1983 with respect to a particular statutory right. And, we have already shown that on the *Sea Clammers*' approach and particularly because the SSA provides eligible individuals with no private means whatever for enforcing their right to child support services, § 1983 remains in force with respect to Title IV-D. Pp. 25-27, *supra*.

Finally, petitioner maintains that *Seminole* held *Ex Parte Young* suits precluded where the statute violated imposes obligations on the state, not on state officers. Pet. Br. 28, relying on 116 S. Ct. at 1133 n.17. *Seminole*, however, discussed the IGRA's emphasis on state obligations simply as yet one more reason for refusing to imply a cause of action against state officers that was not expressly provided by the IGRA. If applied to actions, like this one, brought under the express provision for state officer suits in § 1983, a similar analysis would lead to the conclusion that § 1983 provides no cause of action for violations of the Fourteenth Amendment by state officers, since that Amendment, and the Constitution generally, precludes state action only. That conclusion is obviously absurd, as it would preclude most of the actions heretofore thought without doubt to lie under the *Ex Parte Young* doctrine, including *Ex Parte Young* itself.[42]

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[42] In any event, here the rights-creating statute now provides that, as a condition of receiving federal funds under Title IV-A, a state must submit a plan that includes "certification *by the chief executive officer* of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under [Title IV-D]." 42 U.S.C. § 602(a)(2), as amended by 110 Stat. 2114 (emphasis supplied). The statute therefore does impose responsibilities directly on the chief state officer, who appointed and directs petitioner, and not only the state itself.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX A

Selected provisions of the Social Security Act, 42 U.S.C. § 301 *et seq.*, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Aug. 22, 1996).

Title IV-A

* * * *

42 U.S.C. § 601. Purpose.

(b) NO INDIVIDUAL ENTITLEMENT.—This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.

(Amended by Reconciliation Act, § 103, 110 Stat. 2113.)

42 U.S.C. § 602. Eligible States; State Plan.

(a) IN GENERAL.—As used in this part, the term "eligible State" means, with respect to a fiscal year, a State that, during the 2-year period immediately preceding the fiscal year, has submitted to the Secretary a plan that the Secretary has found includes the following:

* * * *

(2) CERTIFICATION THAT THE STATE WILL OPERATE A CHILD SUPPORT ENFORCEMENT PROGRAM.—A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D.

(Amended by Reconciliation Act, § 103, 110 Stat. 2113-14.)

42 U.S.C. § 608. Prohibitions; Requirements.

(a) IN GENERAL.—

* * * *

(3) NO ASSISTANCE FOR FAMILIES NOT ASSIGNING CERTAIN SUPPORT RIGHTS TO THE STATE.—

(A) IN GENERAL.—A State to which a grant is made under section 603 shall require, as a condition of providing assistance to a family under the State program funded under this part, that a member of the family assign to the State any rights the family member may have (on behalf of the family member or of any other person for whom the family member has applied for or is receiving such assistance) to support from any other person . . .

(Amended by Reconciliation Act § 103, 110 Stat. 2135.)

* * * *

42 U.S.C. § 609. Penalties.

(a) IN GENERAL.—Subject to this section:

* * * *

(8) SUBSTANTIAL NONCOMPLIANCE OF STATE CHILD SUPPORT ENFORCEMENT PROGRAM WITH REQUIREMENTS OF PART D.—

(A) IN GENERAL.—If a State program operated under part D is found as a result of a review conducted under section 652 (a)(4) not to have complied substantially with the requirements of such part for any quarter, and the Secretary determines that the program is not complying substantially with such requirements at the time the finding is made, the Secretary shall reduce the

grant payable to the State under section 603(a)(1) for the quarter and each subsequent quarter that ends before the 1st quarter throughout which the program is found to be in substantial compliance with such requirements by—

(i) not less than 1 nor more than 2 percent;

(ii) not less than 2 nor more than 3 percent, if the finding is the 2nd consecutive such finding made as a result of such a review; or

(iii) not less than 3 nor more than 5 percent if the finding is the 3rd or a subsequent consecutive such finding made as a result of such a review.

(B) DISREGARD OF NONCOMPLIANCE WHICH IS OF A TECHNICAL NATURE.—For purposes of subparagraph (A) and section 652(a)(4), a State which is not in full compliance with the requirements of this part shall be determined to be in substantial compliance with such requirements only if the Secretary determines that any noncompliance with such requirements is of a technical nature which does not adversely affect the performance of the State's program operated under part D.

* * * *

(Amended by Reconciliation Act, § 103, 110 Stat. 2142-46.)

Title IV-D

42 U.S.C. § 651. Authorization of Appropriations.

For the purpose of enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for aid under part A of this subchapter) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

(Amended by Reconciliation Act, § 395(d)(1)(A), 110 Stat. 2259.)

42 U.S.C. § 652. Duties of Secretary.

(a) Establishment of separate organizational unit; duties

The Secretary shall establish, within the Department of Health and Human Services a separate organizational unit, under the direction of a designee of the Secretary, who shall report directly to the Secretary and who shall—

(1) establish such standards for State programs for locating noncustodial parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the noncustodial parent's child is living as he determines to be necessary to assure that such programs will be effective;

* * * *

(3) review and approve State plans for such programs;

(4) . . .

(C) conduct audits, in accordance with the Government auditing standards of the Comptroller General of the United States—

(i) at least once every 3 years (or more frequently, in the case of a State which fails to meet the requirements of this part concerning performance standards and reliability of program data) to assess the completeness, reliability, and security of the data and the accuracy of the reporting systems used in calculating performance indicators under subsection (g) of this section and section 658;

(ii) of the adequacy of financial management of the State program operated under the State plan approved under this part, including assessments of—

(I) whether Federal and other funds made available to carry out the State program are being appropriately expended, and are properly and fully accounted for; and

(II) whether collections and disbursements of support payments are carried out correctly and are fully accounted for; and

(iii) for such other purposes as the Secretary may find necessary.

* * * *

(g) Performance standards for State paternity establishment programs

(1) A State's program under this part shall be found, for purposes of section 603(h) of this title, not to have complied substantially with the requirements of this part unless, for any fiscal year beginning on or after Octo-

ber 1, 1994, its paternity establishment percentage for such fiscal year is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds—

(A) 90 percent;

(B) for a State with a paternity establishment percentage of not less than 75 percent but less than 90 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 2 percentage points;

(C) for a State with a paternity establishment percentage of not less than 50 percent but less than 75 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 3 percentage points;

(D) for a State with a paternity establishment percentage of not less than 45 percent but less than 50 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding year plus 4 percentage points;

(E) for a State with a paternity establishment percentage of not less than 40 percent but less than 45 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 5 perecntage points; or

(F) for a State with a paternity establishment percentage of less than 40 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 6 percentage points.

(h) Prompt State response to requests for child support assistance

The standards required by subsection (a)(1) of this section shall include standards establishing time limits governing the period or periods within which a State must

accept and respond to requests (from States, jurisdictions thereof, or individuals who apply for services furnished by the State agency under this part or with respect to whom an assignment under section 602(a)(26) of this title is in effect) for assistance in establishing and enforcing support orders, including requests to locate noncustodial parents, establish paternity, and initiate proceedings to establish and collect child support awards.

(i) Prompt State distribution of amounts collected as child support

The standards required by subsection (a)(1) of this section shall include standards establishing time limits governing the period or periods within which a State must distribute, in accordance with section 657 of this title, amounts collected as child support pursuant to the State's plan approved under this part.

* * * *

(Amended by Reconciliation Act, § 342(b), 110 Stat. 2233-34; Reconciliation Act § 395(d)(1)(B), 110 Stat. 2259.)

42 U.S.C. 654. State Plan for Child and Spousal Support

A State plan for child and spousal support must—

* * * *

(4) provide that the State will—

(A) provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan with respect to—

(i) each child for whom (I) assistance is provided under the State program funded under part A of this title, (II) benefits or services for foster care maintenance are provided under the State program funded under part E of this title, or (III) medical assistance is provided under the State plan approved

under title XIX, unless, in accordance with paragraph (29), good cause or other exceptions exist;

(ii) any other child, if an individual applies for such services with respect to the child; and

(B) enforce any support obligation established with respect to—

(i) a child with respect to whom the State provides services under the plan; or

(ii) the custodial parent of such a child;

(5) provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment under section 602 (a)(26) of this title is effective, such payments shall be made to the State for distribution pursuant to section 657 of this title and shall not be paid directly to the family, and the individual will be notified on a monthly basis (or on a quarterly basis for so long as the Secretary determines with respect to a State that requiring such notice on a monthly basis would impose an unreasonable administrative burden) of the amount of the support payments collected . . .

(6) provide that . . . (A) services under the plan shall be made available to residents of other States on the same terms as to residents of the State submitting the plan;

(B) an application fee for furnishing such services shall be imposed on individuals not receiving assistance under any State program funded under part A, which shall be paid by the individual applying for such services, or recovered from the absent parent, or paid by the State out of its own funds . . .

* * * *

(8) provide that the agency administering the plan will establish a service to locate noncustodial parents utilizing—

(A) all sources of information and available records, and

(B) the Federal Parent Locator Service established under section 653;

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State—

(A) in establishing paternity, if necessary,

(B) in locating a noncustodial parent residing in the State (whether or not permanently) against whom any action is being taken under a program established under a plan approved under this part in another State,

(C) in securing compliance by a noncustodial parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children with respect to whom aid is being provided under the plan of such other State,

(D) in carrying out other functions required under a plan approved under this part; and

(E) not later than March 1, 1997, in using the forms promulgated pursuant to section 652 (a)(11) for income withholding, imposition of liens, and issuance of administrative subpoenas in interstate child support cases;

* * * *

(11)(A) provide that amounts collected as support shall be distributed as provided in section 657 of this title.

* * * *

(12) provide for the establishment of procedures to require the State to provide individuals who are

applying for or receiving services under the State plan, or who are parties to cases in which services are being provided under the State plan—

(A) with notice of all proceedings in which support obligations might be established or modified; and

(B) with a copy of any order establishing or modifying a child support obligation, or (in the case of a petition for modification) a notice of determination that there should be no change in the amount of the child support award, within 14 days after issuance of such order or determination;

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan;

* * * *

(18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 664 of this title, and take all steps necessary to implement and utilize such procedures;

(19) provide that the agency administering the plan—

(A) shall determine on a periodic basis, from information supplied pursuant to section 508 of the Unemployment Compensation Amendments of 1976, whether any individuals receiving compensation under the State's unemployment compensation law (including amounts payable pursuant to any agreement under any Federal unemployment compensation law) owe child support obligations which are being enforced by such agency, and

(B) shall enforce any such child support obligations which are owed by such an individual but are not being met—

(i) through an agreement with such individual to have specified amounts withheld from compensation otherwise payable to such individual and by submitting a copy of any such agreement to the State agency administering the unemployment compensation law, or

(ii) in the abence of such an agreement, by bringing legal process (as defined in section 662(e) of this title) to require the withholding of amounts from such compensation;

(20) provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws;

* * * *

(25) provide that if a family with respect to which services are provided under the plan ceases to receive assistance under the State program funded under part A, the State shall provide appropriate notice to the family and continue to provide such services, subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished under the plan, except that an application or other request to continue services shall not be required of such a family . . .

* * * *

(Amended by Reconciliation Act, § 301, 110 Stat. 2199-200; Reconciliation Act § 303, 110 Stat. 2204-2205; Reconciliation Act § 304, 110 Stat. 2205; Reconciliation Act § 312, 110 Stat. 2207; Reconciliation Act, § 313, 110 Stat. 2209, Reconciliation Act, § 316(g), 110 Stat. 2218.)

42 U.S.C. § 654B. Collection and Disbursement of Support Payments.

(c) TIMING OF DISBURSEMENTS.

(1) IN GENERAL.—Except as provided in paragraph (2), the State disbursement unit shall distribute all amounts payable under section 657(a) within 2 business days after receipt from the employer or other source of periodic income, if sufficient information identifying the payee is provided.

(2) PERMISSIVE RETENTION OF ARREARAGES.—The State disbursement unit may delay the distribution of collections toward arrearages until the resolution of any timely appeal with respect to such arrearages.

(d) BUSINESS DAY DEFINED.—As used in this section, the term 'business day' means a day on which State offices are open for regular business.

* * * *

(Added by Reconciliation Act, § 312, 110 Stat. 2208.)

42 U.S.C. § 655. Payments to States.

(a) Amounts payable each quarter

(1) From the sums appropriated therefor, the Secretary shall pay to each State for each quarter an amount—

(A) equal to the percent specified in paragraph (2) of the total amounts expended by

such State during such quarter for the operation of the plan approved under section 654 of this title. . .

* * * *

(C) equal to 90 percent (rather than the percentage specified in subparagraph (A)) of so much of the sums expended during such quarter as are attributable to laboratory costs incurred in determining paternity; except that no amount shall be paid to any State on account of amounts expended to carry out an agreement which it has entered into pursuant to section 663 of this title. In determining the total amounts expended by any State during a quarter, for purposes of this subsection, there shall be excluded an amount equal to the total of any fees collected or other income resulting from services provided under the plan approved under this part.

(2) The percent applicable to quarters in a fiscal year for purposes of paragraph (1)(A) is—

* * * *

(C) 66 percent for fiscal year 1990 and each fiscal year thereafter.

* * * *

(Amended by Reconciliation Act, § 344, 110 Stat 2236.)

42 U.S.C. § 658. Incentive payments to States.

(a) Purpose; requirement; quarterly payments

In order to encourage and reward State child support enforcement programs which perform in a cost-effective and efficient manner to secure support for all children who have sought assistance in securing support, whether such children reside within the State or elsewhere and whether or not they are eligible for assistance under a program funded under part A, and regardless of the eco-

nomic circumstances of their parents, the Secretary shall, from support collected which would otherwise represent the Federal share of assistance to families of noncustodial parents, pay to each State for each fiscal year, on a quarterly basis (as described in subsection (e) of this section) beginning with the quarter commencing October 1, 1985, an incentive payment in an amount determined under subsection (b) of this section.

* * * *

(Amended by Reconciliation Act, § 341, 110 Stat. 2231-33.)

42 U.S.C. § 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement.

(a) Types of procedures required

In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

(1)(A) Procedures described in subsection (b) for the withholding from income of amounts payable as support in cases subject to enforcement under the State plan.

(B) Procedures under which the income of a person with a support obligation imposed by a support order issued (or modified) in the State before October 1, 1996, if not otherwise subject to withholding under subsection (b), shall become subject to withholding as provided in subsection (b) if arrearages occur, without the need for a judicial or administrative hearing.

(2) Expedited administrative and judicial procedures (including the procedures specified in subsection (c)) for establishing paternity and for establishing, modifying, and enforcing support obligations. . .

* * * *

(4) LIENS.—Procedures under which—

(A) liens arise by operation of law against real and personal property for amounts of overdue support owed by a noncustodial parent who resides or owns property in the State; and

(B) the State accords full faith and credit to liens described in subparagraph (A) arising in another State, when the State agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the State, except that such rules may not require judicial notice or hearing prior to the enforcement of such a lien.

* * * *

(5) PROCEDURES CONCERNING PATERNITY ESTABLISHMENT.—

(A) ESTABLISHMENT PROCESS AVAILABLE FROM BIRTH UNTIL AGE 18.—

(i) Procedures which permit the establishment of the paternity of a child at any time before the child attains 18 years of age.

(ii) As of August 16, 1984, clause (i) shall also apply to a child for whom paternity has not been established or for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State.

(B) PROCEDURES CONCERNING GENETIC TESTING.—

(i) GENETIC TESTING REQUIRED IN CERTAIN CONTESTED CASES.—Procedures under

which the State is required, in a contested paternity case (unless otherwise barred by State law) to require the child and all other parties (other than individuals found under section 654(29) to have good cause and other exceptions for refusing to cooperate) to submit to genetic tests upon the request of any such party, if the request is supported by a sworn statement by the party—

(I) alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or

(II) denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties.

(ii) OTHER REQUIREMENTS. — Procedures which require the State agency, in any case in which the agency orders genetic testing—

(I) to pay costs of such tests, subject to recoupment (if the State so elects) from the alleged father if paternity is established; and

(II) to obtain additional testing in any case if an original test result is contested, upon request and advance payment by the contestant.

(C) VOLUNTARY PATERNITY ACKNOWLEDGMENT.—

(i) SIMPLE CIVIL PROCESS.—Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and a putative father can sign an acknoweldgment of paternity, the mother and the putative father must be given notice, orally and in writing, of the alternatives to, the legal consequences of, and the rights (including, if 1 parent is a minor, any rights afforded due to minority status) and re-

sponsibilities that arise from, signing the acknowledgment.

* * * *

(D) STATUS OF SIGNED PATERNITY ACKNOWLEDGMENT.—

(i) INCLUSION IN BIRTH RECORDS.—Procedures under which the name of the father shall be included on the record of birth of the child of unmarried parents only if—

(I) the father and mother have signed a voluntary acknowledgment of paternity; or

(II) a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity.

Nothing in this clause shall preclude a State agency from obtaining an admission of paternity from the father for submission in a judicial or administrative proceeding, or prohibit the issuance of an order in a judicial or administrative proceeding which bases a legal finding of paternity on an admission of paternity by the father and any other additional showing required by State law.

(ii) LEGAL FINDING OF PATERNITY.—Procedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of—

(I) 60 days; or

(II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.

(iii) CONTEST.—Procedures under which, after the 60-day period referred to in clause (ii), a signed

voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger, and under which the legal responsibilities (including child support obligations) of any signatory arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

(E) BAR ON ACKNOWLEDGMENT RATIFICATION PROCEEDINGS. — Procedures under which judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity.

(F) ADMISSIBILITY OF GENETIC TESTING RESULTS.—Procedures—

(i) requiring the admission into evidence, for purposes of establishing paternity, of the results of any genetic test that is—

(I) of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary; and

(II) performed by a laboratory approved by such an accreditation body;

(ii) requiring an objection to genetic testing results to be made in writing not later than a specified number of days before any hearing at which the results may be introduced into evidence (or, at State option, not later than a specified number of days after receipt of the results); and

(iii) making the test results admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made.

(G) PRESUMPTION OF PATERNITY IN CERTAIN CASES.—Procedures which create a re-

buttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

* * * *

(K) PROOF OF CERTAIN SUPPORT AND PATERNITY ESTABLISHMENT COSTS.—Procedures under which bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

* * * *

(M) FILING OF ACKNOWLEDGMENTS AND ADJUDICATIONS IN STATE REGISTRY OF BIRTH RECORDS.—Procedures under which voluntary acknowledgments and adjudications of paternity by judicial or administrative processes are filed with the State registry of birth records for comparison with information in the State case registry.

* * * *

(7) REPORTING ARREARAGES TO CREDIT BUREAUS.—

(A) IN GENERAL.—Procedures (subject to safeguards pursuant to subparagraph (B)) requiring the State to report periodically to consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) the name of any noncustodial parent who is delinquent in the payment of support, and the amount of overdue support owed by such parent.

* * * *

(8)(A) Procedures under which all child support orders not described in subparagraph (B) will include provision for withholding from income, in

order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part.

(B) Procedures under which all child support orders which are initially issued in the State on or after January 1, 1994, and are not being enforced under this part will include the following requirements:

(i) The income of a noncustodial parent shall be subject to withholding, regardless of whether support payments by such parent are in arrears, on the effective date of the order; except that such income shall not be subject to withholding under this clause in any case where (I) one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding, or (II) a written agreement is reached between both parties which provides for an alternative arrangement.

* * * *

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)—

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced.

(B) entitled as a judgment to full faith and credit in such State and in any other State; and

(C) not subject to retroactive modification by such State or by any other State; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice

of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

* * * *

(10) REVIEW AND ADJUSTMENT OF SUPPORT ORDERS UPON REQUEST.—

(A) 3-YEAR CYCLE.—

(i) IN GENERAL.—Procedures under which every 3 years (or such shorter cycle as the State may determine), upon the request of either parent, or, if there is an assignment under part A, upon the request of the State agency under the State plan or of either parent, the State shall with respect to a support order being enforced under this part, taking into account the best interests of the child involved—

(I) review and, if appropriate, adjust the order in accordance with the guidelines established pursuant to section 667(a) if the amount of the child support award under the order differs from the amount that would be awarded in accordance with the guidelines;

(II) apply a cost-of-living adjustment to the order in accordance with a formula developed by the State;

* * * *

(C) NOTICE OF RIGHT TO REVIEW.—Procedures which require the State to provide notice not less than once every 3 years to the parents subject to the order informing the parents of their right to request the State to review and, if appropriate, adjust the order pursuant to this paragraph. The notice may be included in the order.

(11) Procedures under which a State must give full faith and credit to a determination of paternity made by any other State, whether established through

voluntary acknowledgment or through administrative or judicial processes.

(12) LOCATOR INFORMATION FROM INTERSTATE NETWORKS.—Procedures to ensure that all Federal and State agencies conducting activities under this part have access to any system used by the State to locate an individual for purposes relating to motor vehicles or law enforcement.

* * * *

(14) ADMINISTRATIVE ENFORCEMENT IN INTERSTATE CASES.—Procedures under which—

(A)(i) the State shall respond within 5 business days to a request made by another State to enforce a support order . . . .

* * * *

(c) EXPEDITED PROCEDURES.—The procedures specified in this subsection are the following:

(1) ADMINISTRATIVE ACTION BY STATE AGENCY.—Procedures which give the State agency the authority to take the following actions relating to establishment of paternity or to establishment, modification, or enforcement of support orders, without the necessity of obtaining an order from any other judicial or administrative tribunal, and to recognize and enforce the authority of State agencies of other States to take the following actions:

(A) GENETIC TESTING.—To order genetic testing for the purpose of paternity establishment as provided in section 666(a)(5).

(B) FINANCIAL OR OTHER INFORMATION.—To subpoena any financial or other information needed to establish, modify, or enforce a support order, and to impose penalties for failure to respond to such a subpoena.

(C) RESPONSE TO STATE AGENCY REQUEST.—To require all entities in the State (including for-profit, nonprofit, and governmental employers) to provide promptly, in response to a request by the State agency of that or any other State administering a program under this part, information on the employment, compensation, and benefits of any individual employed by such entity as an employee or contractor, and to sanction failure to respond to any such request.

(D) ACCESS TO INFORMATION CONTAINED IN CERTAIN RECORDS.—To obtain access, subject to safeguards on privacy and information security, and subject to the nonliability of entities that afford such access under this subparagraph, to information contained in the following records (including automated access, in the case of records maintained in automated databases).

* * * *

(F) INCOME WITHHOLDING.—To order income withholding in accordance with subsections (a)(1)(A) and (b) of section 666.

(G) SECURING ASSETS.—In cases in which there is a suport arrearage, to recure assets to satisfy the arrearage by—

(i) intercepting or seizing periodic or lump-sum payments from—

(I) a State or local agency, including unemployment compensation, workers' compensation, and other benefits; and

(II) judgments, settlements, and lotteries;

(ii) attaching and seizing assets of the obligor held in financial institutions;

(iii) attaching public and private retirement funds; and

(iv) imposing liens in accordance with subsection (a)(4) and, in appropriate cases, to force sale of property and distribution of proceeds.

(H) INCREASE MONTHLY PAYMENTS.—For the purpose of securing overdue support, to increase the amount of monthly support payments to include amounts of arrearages, subject to such conditions or limitations as the State may provide.

* * * *

APPENDIX B

Selected Regulations of the Department of Health and Human Services, Title 45, Code of Federal Regulations.

45 CFR Part 303

Standards for Program Operations

§ 303.0 Scope and applicability of this part.

This part prescribes: . . .

(b) The standards for program operation which the IV-D agency must meet.

* * * *

§ 303.2 Establishment of cases and maintenance of case records.

(a) The IV-D agency must:

(1) Make applications for child support services readily accessible to the public;

(2) When an individual requests an application or IV-D services, provide an application to the individual on the day the individual makes a request in person or send an application to the individual within no more than 5 working days of a written or telephone request. Information describing available services, the individual's rights and responsibilities, and the State's fees, cost recovery and distribution policies must accompany all applications for services and must be provided to AFDC, Medicaid and title IV-E foster care applicants or recipients within no more than 5 working days of referral to the IV-D agency; and

(3) Accept an application as filed on the day it and the application fee are received. An application is a written document provided by the State which indicates that

the individual is applying for child support enforcement services under the State's title IV-D program and is signed by the individual applying for IV-D services.

(b) For all cases referred to the IV-D agency or applying for services under § 302.33 of this chapter, the IV-D agency must, within no more than 20 calendar days of receipt of referral of a case or filing of an application for services under § 302.33, open a case by establishing a case record and, based on an assessment of the case to determine necessary action:

(1) Solicit necessary and relevant information from the custodial parent and other relevant sources and initiate verification of information, if appropriate; and

(2) If there is inadequate location information to proceed with the case, request additional information or refer the case for further location attempts, as specified in § 303.3.

(c) The case record must be supplemented with all information and documents pertaining to the case, as well as all relevant facts, dates, actions taken, contacts made and results in a case.

§ 303.3 Location of absent parents.

(a) *Definition. Location* means information concerning the physical whereabouts of the absent parent, or the absent parent's employer(s), other sources of income or assets, as appropriate, which is sufficient and necessary to take the next appropriate action in a case.

(b) For all cases referred to the IV-D agency or applying for services under § 302.33 of this chapter, the IV-D agency must attempt to locate all absent parents or sources of income and/or assets when location is necessary to take necessary action. Under this standard, the IV-D agency must:

(1) Use appropriate location sources such as the Federal PLS; interstate location networks; local officials and

employees administering public assistance, general assistance, medical assistance, food stamps and social services (whether such individuals are employed by the State or a political subdivision); relatives and friends of the absent parent; curent or past employers; the local telephone company; the U.S. Postal Service; financial references; unions; fraternal organizations; and police, parole, and probation records if appropriate; and State agencies and departments, as authorized by State law, including those departments which maintain records of public assistance, wages and employment, unemployment insurance, income taxation, driver's licenses, vehicle registration, and criminal records;

* * * *

(3) Within no more than 75 calendar days of determining that location is necessary, access all appropriate location sources, including transmitting appropriate cases to the Federal [Parent Location Service], and ensure that location information is sufficient to take the next appropriate action in a case;

(4) Refer appropriate cases to the IV-D agency of any other State, in accordance with the requirements of § 303.7 of the Part. The I-D agency of such other State shall follow the procedures in paragraphs (b)(1) through (b)(3) of this section for such cases, as necessary, except that the responding State is not required to access the Federal PLS under paragraph (b)(3) of this section;

(5) Repeat location attempts in cases in which previous attempts to locate absent parents or sources of income and/or assets have failed, but adequate identifying and other information exists to meet requirements for submittal for location, either quarterly or immediately upon receipt of new information which may aid in location, whichever occurs sooner. Quarterly attempts may be limited to automated sources but must include accessing State employment security files. Repeated attempts because of new information which may aid in location must meet the requirements of paragraph (b)(3) of this section; and

(c) The State must establish guidelines defining diligent efforts to serve process. These guidelines must include periodically repeating service of process attempts in cases in which previous attempts to serve process have failed, but adequate identifying and other information exists to attempt service of process.

§ 303.4 Establishment of support obligations.

For all cases referred to the IV-D agency or applying under § 302.33 of this chapter, the IV-D Agency must:

(a) When necessary, establish paternity pursuant to the standards of § 303.5;

(b) Utilize appropriate State statutes and legal processes in establishing the support obligation pursuant to § 302.50 of this chapter.

(c) Periodically review and adjust child support orders, as appropriate, in accordance with § 303.8.

(d) Within 90 calendar days of locating the alleged father or noncustodial parent, regardless of whether paternity has been established, establish an order for support or complete service of process necessary to commence proceedings to establish a support order and, if necessary, paternity (or document unsuccessful attempts to serve process, in accordance with the State's guidelines defining diligent efforts under § 303.3(c)).

* * * *

§ 303.5 Establishment of paternity.

(a) For all cases referred to the IV-D agency or applying for services under § 302.33 of this chapter in which paternity has not been established, the IV-D agency must, as appropriate;

(1) Provide an alleged father the opportunity to voluntarily acknowledge paternity in accordance with § 302.70(a)(5)(iii); and

(2) Attempt to establish paternity by legal process established under State law.

* * * *

(d)(1) Upon the request of any party in a contested paternity case, the IV-D agency, if the agency lacks the authority to order such tests, shall petition the court or administrative authority to require all parties to submit to genetic tests unless . . .

* * * *

(f) The IV-D agency must seek entry of a default order by the court or administrative authority in a paternity case by showing that process has been served on the defendant in accordance with State law, that the defendant has failed to respond to service in accordance with State procedures, and any additional showing required by State law, in accordance with § 302.70(a)(5)(viii).

(g) *Hospital-based program.*

(1) The State must establish, in cooperation with hospitals, a hospital-based program in every public and private birthing hospital. . . .

(2) During the period immediately before or after the birth of a child to an unmarried woman in the hospital, a hospital-based program must, at a minimum:

(i) Provide to both the mother and alleged father, if he is present in the hospital:

(A) Written materials about paternity establishment,

(B) the forms necessary to voluntarily acknowledge paternity,

(C) a written description of the rights and responsibilities of acknowledging paternity, and

(D) the opportunity to speak with staff, either by telephone or in person, who are trained to clarify information and answer questions about paternity establishment;

(ii) Provide the mother and alleged father, if he is present, the opportunity to voluntarily acknowledge paternity in the hospital;

(iii) Afford due process safeguards;

* * * *

§ 303.6 Enforcement of support obligations.

For all cases referred to the IV-D agency or applying for services under § 302.33 in which the obligation to support and the amount of the obligation have been established, the IV-D agency must maintain and use an effective system for:

(a) Monitoring compliance with the support obligation;

(b) Identifying on the date the parent fails to make payments in an amount equal to the support payable for one month, or on an earlier date in accordance with State law, those cases in which there is a failure to comply with the support obligation; and

(c) Enforcing the obligation by:

(1) Initiating income withholding . . .

(2) Taking any appropriate enforcement action (except income withholding and Federal and State income tax refund offset) unless service of process is necessary, within no more than 30 calendar days of identifying a delinquency or other support-related non-compliance with the order or the location of the absent parent, whichever occurs later. If service of process is necessary prior to taking an enforcement action, service must be completed (or unsuccessful attempts to serve process must be documented in accordance with the State's guidelines defining diligent efforts . . ., and enforcement action taken if process is served, within no later than 60 calendar days of identifying a delinquency or other support-

related non-compliance with the order, or the location of the absent parent, whichever occurs later . . . .

* * * *

§ 303.7 Provision of services in interstate IV-D cases.

* * * *

(b) *Initiating State IV-D agency responsibilities.* The IV-D agency must:

(1) If the State has a long-arm statute which allows paternity establishment, use the authority to establish paternity whenever appropriate.

(2) Except as provided in paragraph (b)(1) of this section, within 20 calendar days of determining that the absent parent is in another State, and, if appropriate, receipt of any necessary information needed to process the case, refer any interstate IV-D case to the responding State's interstate central registry for action, including URESA petitions and requests for location, document verification, administrative reviews in Federal Income tax refund offset cases, wage withholding, and State income tax refund offset in IV-D cases.

* * * *

§ 303.8 Review and adjustment of child support orders.

* * * *

(c) *Review of child support orders.* . . . [T]he State must, when providing services under this chapter:

(1) Have in effect and use a process for review and adjustment of child support orders in effect in the State, including a process for challenging a proposed adjustment or determination.

(2) Notify each parent subject to a child support order in the State of the right to request a review of the order, and the appropriate place and manner in which the request should be made.

* * * *

(4) Review child support orders at 36-month intervals after establishment of the order or the most recent review, unless [exceptions apply.]

* * * *

(6) Notify or serve process upon each parent subject to a child support order . . .

* * * *

§ 303.100 Procedures for wage or income withholding.

(a) *General withholding requirements.* (1) The State must ensure that in the case of each absent parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of his or her wages must be withheld, in accordance with this section, as is necessary to comply with the order.

(2) In addition to the amount to be withheld to pay the current month's obligation, the amount to be withheld must include an amount to be applied toward liquidation of overdue support.

* * * *

PART 304—FEDERAL FINANCIAL PARTICIPATION

* * * *

§ 304.10 General administrative requirements.

As a condition for Federal financial participation, the provisions of Part 74 of this title (with the exception of Subpart G, Matching and Cost Sharing and Subpart I, Financial Reporting Requirements) establishing uniform administrative requirements and cost principles shall apply to all grants made to States under this part.

* * * *

45 CFR Part 74

Termination and Enforcement

§ 74.60 Purpose of termination and enforcement.

Sections 74.61 and 74.62 set forth uniform suspension, termination and enforcement procedures.

§ 74.61 Termination.

(a) Awards may be terminated in whole or in part only if paragraph (a)(1), (2), or (3) of this section applies.

(1) By the HHS awarding agency, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the HHS awarding agency with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the HHS awarding agency written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if the HHS awarding agency determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, it may terminate the award in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in § 74.71(a), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 74.62 Enforcement.

(a) If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute or regulation, an assurance, an application, or a notice of award, the HHS awarding agency may, in addition to imposing any of the special conditions outlined in § 74.14, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the HHS awarding agency.

(2) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award.

(4) Withhold further awards for the project or program.

* * * *

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In The

Supreme Court of the United States

October Term, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Under Respondents' interpretation of Title IV-D and § 1983, each of the 18 million custodial parents in the United States is entitled to sue State officials to enforce every statutory and regulatory provision of Title IV-D. This is a breathtaking proposition. Respondents concede it is not supported by any express right to a private cause of action under Title IV-D. Resp. Br. 8 ("Title IV-D does not provide for private enforcement at all"). Instead, Respondents depend upon implied rights under the Social Security Act that, in turn, depend upon a presumption that § 1983 imposes broad liability upon States absent clear evidence in the underlying statute that Congress meant to limit or eliminate State liability. Of course, this approach conflicts directly with this Court's holdings that under Spending Clause statutes, States only accept the consequences (such as private enforcement actions) that are expressly provided for in the legislation creating the grant program.

To be sure, the Court could decide this case solely on the basis that Title IV-D simply does not unambiguously confer any enforceable rights upon Respondents and that the Secretary's remedies evidence congressional intent to preclude private enforcement. This case, however, provides the Court with the vehicle for providing much needed clarity concerning the proper interpretation of § 1983 as it applies to Spending Clause legislation.

The Court's 16-year struggle since it issued *Maine v. Thiboutot*, 448 U.S. 1 (1980), to develop a coherent body of law that reasonably guides lower courts in deciding what statutory "rights" are protected by § 1983 justifies a reevaluation of that statute's scope. The Court should restrict § 1983 to the enforcement of federal statutes that contain an unequivocally expressed private cause of action within them and should stop presuming that federal laws may be enforced against the States and their officers, even where those laws would not be enforced against private defendants. Alternatively, the Court should restrict § 1983 to the enforcement

of those constitutional and statutory rights that are based on Congress' exercise of authority under § 5 of the Fourteenth Amendment. Only in this way can the Court properly respect the States' sovereignty interests in not being subjected to endless litigation concerning which federal statutory rights and implementing regulations can be enforced privately. And only in this way can Congress reassume responsibility for deciding expressly when States must accept private causes of action as a condition of receiving federal funds under Spending Clause programs.

I. TITLE IV-D DOES NOT CREATE ENFORCEABLE RIGHTS IN RESPONDENTS.

1. Section 1983 is procedural, not substantive. It creates no rights itself, but merely enforces rights created elsewhere. Respondents lose sight of this distinction by focusing on the words "laws" and "secure" and thereby ignoring the critical question that *Wright*, *Wilder*, and *Suter* pose: whether Title IV-D creates a "right" that Respondents may enforce via § 1983.

Contrary to Respondents' assertion, Petitioner does not maintain that Congress must specifically authorize a private enforcement action in a statute before § 1983 is available as a remedy. Resp. Br. 11, 42. Rather, Petitioner maintains that for Congress to create a right in Respondents, it must use "unambiguously" clear language to this effect in Title IV-D. *Suter v. Artist M.*, 503 U.S. 347, 356 (1992). Demanding a clear statement from Congress satisfies at least two vital requirements: (1) it gives participating States the requisite notice that the statute includes rights enforceable by private parties and that being subject to suits to enforce such rights is therefore a condition of accepting Title IV-A and IV-D funds, *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"), and (2) it reduces the separation of powers concerns that are inherent whenever courts are asked to divine Congress' intent concerning a subject that Congress

has never explicitly addressed. Federal courts currently are left to decide whether "rights" enforceable under § 1983 exist in other federal statutes, and in doing so they create quasi-implied causes of action under such statutes. *See* Pet. Br. 11.

The fact that the Secretary – the person most closely associated with Title IV-D – has changed her position with respect to whether Title IV-D creates rights enforceable by § 1983 (S.G. Br. 17 n.18) speaks volumes as to how "unambiguous" any "right" asserted by Respondents really is. Although the Solicitor General maintains that the 1988 and later amendments caused the Secretary to change her position (*id.*), it is unclear which aspects of those amendments supposedly caused this sudden "change." Indeed, as recently as 1990, the Secretary's position in this Court was that Title IV-D did *not* create enforceable rights in private individuals. *See Brown v. Ledbetter* (U.S. No. 89-1030), U.S. Br. in Opp. 10-11 (filed Feb. 1990) (Title IV-D "and its implementing regulations do not envision a program creating enforceable rights to services in specific individuals"); *id.* at 11 n.12 (Title IV-D's "comprehensive oversight and enforcement scheme demonstrates that Congress intended to foreclose private enforcement of its requirements through actions under Section 1983"); *id.* at 12 n.12 ("Congress did not intend that state compliance with federal requirements for operation of child support enforcement programs would be policed through private suits by recipients under Section 1983").[1]

The question remains whether Title IV-D unambiguously confers any enforceable rights in favor of Respondents. Respondents assert initially that Title IV-D "assures every child the 'right to support, inheritance, and to know who his father is.' " Resp. Br. 1 (quoting S. Rep. No. 1356, 93d Cong., 2d Sess. 51 (1974)). These are certainly worthy sentiments,

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[1] As evidenced by the *amicus* brief filed by 46 States and Territories, the other parties to the federal-state agreement have always understood Title IV-D to be enforceable only by the Secretary and not by private parties. *See* Illinois *Amicus* Brief.

but they are found only in background materials and they do not rise to the level of enforceable "rights" under § 1983. *See Pennhurst I*, 451 U.S. at 13 (holding that a statutory "bill of rights" in the Developmentally Disabled Assistance and Bill of Rights Act was not enforceable under § 1983). "It is simply a general statement of 'findings' and, as such, is too thin a reed to support the rights and obligations read into it" by Respondents. *Id.* at 19.

Yet even though the "right to support, inheritance, and to know who [the child's] father is" is not enforceable under § 1983, that, at bottom, is clearly the "right" that Respondents seek to have vindicated. Respondents want money and they want paternity established; in short, they want results. If participating States were obligated to secure support and establish paternity for each Title IV-D applicant as a condition of receiving federal funds, Respondents might have a claim against Petitioner. But Title IV-D does *not* require participating States to guarantee success. As a consequence, winning this case will not assure any Respondent any more money in hand or the establishment of paternity. Respondents do not and cannot deny that their injuries of lack of child support were caused by the noncustodial parents, not Petitioner. Pet. Br. 16, 18-19. Accordingly, such injuries are not redressable in this suit against Petitioner.

Alternatively, Respondents and the United States assert that Title IV-D creates a right of individuals to receive enforcement *services* from the State. Resp. Br. 22-25; S.G. Br. 10, 17-18. According to Respondents, Title IV-D guarantees that each participating State will provide the entire litany of enforcement services, such as those found in 42 U.S.C. § 666, to the letter 100% of the time to 100% of eligible applicants. Thus, according to Respondents, each IV-D applicant may sue under § 1983 if the State fails to perform any one of the hundreds of possible actions involved in providing services over the potential course of more than 20 years.

This is an astonishing proposition with ominous implications. It means that anytime an individual is dissatisfied with an aspect of child support and alleges that the State has not delivered just *one* of the many enforcement services required by Title IV-D, that individual may sue the State's Director of Child Support Enforcement under § 1983 to obtain, at a minimum, an injunction and attorneys' fees (under 42 U.S.C. § 1988). Yet Respondents and their *amici* can point to *no* State that provides 100% of the services 100% of the time, because this is impossible. *See* American Public Welfare Association *Amicus* Br. 5 (noting that the national child support collection rate is only 18 percent because "at every step in this complex and massive program, States run into any number of external variables that are outside their control, yet can drive the outcome and, in some cases, make enforcement impossible"); *see also id.* 5-16 (identifying a sampling of the real-world, practical problems that child support enforcement programs face daily). Thus, the financial and administrative burdens that flow from Respondents' assertion that 18 million individuals have the right to enforce Title IV-D in court are staggering. Indeed, as the Secretary informed the Eleventh Circuit, "[a] guarantee . . . of the full range of . . . child support enforcement services their individual cases might warrant would bankrupt IV-D agencies across the country." *Brown v. Ledbetter* (11th Cir. No. 87-8345), Brief for Federal Appellee (filed Nov. 1987) (a copy of which is being lodged with the Clerk).[2]

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[2] Even the United States disagrees with the full extent of Respondents' sweeping 100% provision of services contention, because it admits that States have a certain amount of prosecutorial discretion. S.G. Br. 10 ("Congress preserved state discretion in some areas, such as selecting appropriate collection tools and initiating judicial proceedings"). Yet even that modified position is unworkable, because without a clear statement of which provisions are enforceable and which are not, States will face burdensome lawsuits in cases that may ultimately be dismissed on prosecutorial discretion grounds.

In light of Title IV-D's scope, complexity, and interstate aspects, Congress explicitly directed that the *Secretary*, not individuals or the judiciary, would provide the enforcement necessary to insure compliance through a detailed system of audits, penalties, and incentive payments. See 42 U.S.C. § 652; Pet. Br. 20-23. Congress' decision to vest exclusive oversight of the Title IV-D program in the Secretary was perfectly reasonable, given that (i) the federal government's money is involved, (ii) Congress has provided the Secretary with the resources to develop an expertise in this complicated field that no federal court can match, and (iii) enforcement by private parties instead of by a central authority could lead to inconsistent results (as evidenced by the conflicts in the lower courts). The Secretary's oversight of each State's program insures that the requirements imposed upon States to provide Title IV-D services are not a "dead letter" without a private cause of action. *See Suter*, 503 U.S. at 360-61; Pet. Br. 20-23. The Secretary enforces the "contract" between participating States and the federal government.[3]

Petitioner shares Respondents' concern for children. She recognizes the need for a quality child support enforcement program, and indeed she – along with thousands of other devoted public servants in Arizona – has dedicated her talents and energies to helping Respondents and others in need of

[3] Thus, the results reached in *Bell v. New Jersey*, 461 U.S. 773 (1983), and *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), support Petitioner, not Respondents. Resp. Br. 12-13 n.12. Both cases concerned the *federal* government's recovery of funds that States had spent in an inappropriate manner. Moreover, this Court determined that the plain language of both statutes at issue authorized the suit and thereby provided the clarity that *Pennhurst I* requires. *See Bell*, 461 U.S. at 790 n.17; *Bennett*, 470 U.S. at 665-66. *United States v. Texas*, 507 U.S. 529, 538 n.6 (1993), which concerned the *federal* government's ability to seek the traditionally available remedy of prejudgment interest on debts owed by a State under the terms of a federal grant agreement, is similarly inapposite.

such governmental services.[4] Nevertheless, there simply are not enough resources available for government to do everything for everyone every time. Indeed, even if a court ordered Petitioner to divert to the Title IV-D program all of the resources her agency has to provide other critically important services – including those involving adoption, child care, child protection, developmental disability, elder abuse, and food stamps – she still would not be able to satisfy every Title IV-D recipient completely.

2. Contrary to Respondents' claim, "substantial compliance" continues to play a vital role in Title IV-D, and it undercuts any argument that Title IV-D provides privately enforceable "rights." It is common ground that "substantial compliance" was the touchstone for compliance before Congress passed the 1996 amendments to Title IV-D.[5] Resp. Br. 16-17 (noting that 42 U.S.C. § 602(a)(27)'s recitation of "substantial compliance" has been superseded by the 1996 Act, while acknowledging that the term still appears in two other places); S.G. Br. 5-6 & n.6 (the Secretary has interpreted "substantial compliance" to mean "75% compliance for most . . . program functions"). "Substantial compliance" still has a significant place under the 1996 Act.

All parties agree that, under the 1996 Act, the Secretary's penalty provisions remain the same and are still tied to whether a State "complie[s] substantially" with Title IV-D's

[4] Arizona's commitment to Title IV-D is paying off: during the last four years Arizona has doubled its child support collections (one of only four States to do so; *see* U.S. Department of Health & Human Services News Release (Oct. 23, 1996)), obtained federal certification of its automation program (one of only six States to do so; *see Child Support Report* (U.S. Dep't Health & Human Services), Oct. 1996 at 6.), and won various national and regional awards. *See* Cert. Reply 2-3, n.1.

[5] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105-2355 ("the 1996 Act").

requirements.[6] See 110 Stat. 2145-46 (to be codified at 42 U.S.C. § 609(a)(8)). States still have to comply with certain support establishment and enforcement requirements 75% of the time. A State's IV-D program *as a whole* must comply with the requirements imposed by Congress and the Secretary. Even the United States concedes that this system-wide requirement is enforceable only by the Secretary, not by individuals such as Respondents. S.G. Br. 20. Yet that is precisely what Respondents' Complaint seeks – a judicial order that Arizona "achieve as well as sustain substantial compliance with federal law, *throughout all programmatic operations* at issue." J.A. 42 (emphasis added).[7]

Finally, Respondents and the Solicitor General misconstrue Petitioner's argument regarding "substantial compliance." Petitioner does not suggest that any participating State can simply ignore one-quarter of its case load. Petitioner recognizes that the statute and its implementing regulations require the State to attempt in good faith to provide services to all eligible applicants. But that does not mean that the State must succeed in providing every individual service to every individual recipient every time, or that the failure to do so warrants judicial intervention by way of a structural injunction. Rather, under the detailed system that Congress designed, a State's performance is to be judged only at the

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[6] Congress originally required "full compliance" by the States, but reduced the standard to "substantial compliance" in 1984. *See* Ill. *Amicus* Br. 13 n.8, 14. To date, the Secretary has found "the use of a 75 percent standard [to be] both rigorous and reasonable." 50 Fed. Reg. 40121 (1985). The definition of what constitutes "substantial compliance" may change under the Secretary's forthcoming regulations, S.G. Br. 9 n.10, but that does not alter the fact that "substantial compliance" remains the touchstone.

[7] Because the Secretary's last audit of Arizona's Title IV-D program revealed in 1994 that the State has in fact "*achieved* substantial compliance," Cert. Reply App. 1 (emphasis added), that portion of the case is moot. All that remains is Respondents' request for an injunction requiring Arizona to "sustain" substantial compliance.

system-wide level, only on the basis of "substantial compliance," and, most importantly, only by the Secretary. In sum, Title IV-D simply does not confer any enforceable right upon any individual applicant that would permit suit to be filed under § 1983.

3. This Court's decisions delineating the nature of state-federal relations with respect to Spending Clause legislation seriously undermine the argument that Title IV-D can be enforced privately. Federal-state agreements concerning cooperative programs established pursuant to Congress' spending power are contractual in nature. *See, e.g., Pennhurst I*, 451 U.S. at 17 (the "legitimacy of Congress' power to legislate under the spending power [ ] rests on whether the State voluntarily and knowingly accepts the terms of the 'contract' "); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The validity of a contract between two sovereigns requires, as this Court has insisted, that Congress identify all terms and conditions placed upon Spending Clause grants "unambiguously" and with a "clear voice" so that States can exercise their choice whether to accept the grant and implement the cooperative program " 'knowingly, cognizant of the *consequences* of their participation.' " *Id.* (emphasis added) (quoting *Pennhurst I*, 451 U.S. at 17). Respondents tacitly agree that the contract analysis is applicable by observing that in "docking states not meeting the IV-D obligations contained in their IV-A grants, Congress is in effect recouping *liquidated damages* for welfare costs that could have been avoided." Resp. Br. 17 n.18 (emphasis added).[8]

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[8] The requirement that Congress "unambiguously" set forth the conditions that it attaches to federal funds is not simply grounded in the basic tenets of contract law, but is also based on certain constitutional considerations. The first consideration – federalism – arises from the fact that the Title IV-D program is a contract entered into by two sovereigns. As such, the mechanism for enforcing the contract's provisions has the potential to expose the State to actions in federal court and thus raises Eleventh Amendment concerns. *See Seminole Tribe*, 116 S. Ct. 1114, 1122 (1996) ("[i]t is inherent in the nature of sovereignty not to be amenable to

Contrary to Respondents' assertion, the consequences of the States' participation were not limited to the requirements that the States comply with Title IV-D and that they have their compliance measured in a particular manner. Being subject to suit by millions of private individuals was certainly a consequence that the States were also entitled to weigh before deciding whether to take part. However, because rights enforceable under § 1983 are currently identified on a provision-by-provision basis by courts rather than by Congress, the States did not receive the notice that *Pennhurst I* requires concerning the rights, if any, that individuals could privately enforce under Title IV-D. *See Pennhurst I*, 451 U.S. at 17.

Respondents take pains to emphasize the comprehensive and precise nature of Title IV-D. *See*, *e.g.*, Resp. Br. 9 ("painstakingly developed"), 15 ("exacting, concrete detail"). Surely, amidst all of the elements of Title IV-D's detailed remedial scheme – audits, financial incentives, and financial penalties – Congress did not simply "forget" to include private enforcement remedies. *See Seminole Tribe*, 116 S. Ct. at 1132 ("where Congress has provided a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*").

Congress identified only one set of consequences in Title IV-D: that the Secretary would impose a financial penalty upon States that failed the Secretary's audits for substantial compliance with Title IV-D's requirements. 42 U.S.C. § 609.

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the suit of an individual without its consent") (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

The second consideration arises from the doctrine of separation of powers. The Constitution gives Congress the exclusive power to determine the conditions that attach to federal grants and the jurisdiction of Article III courts. It is thus axiomatic that neither of the other two coordinate branches of the federal government has the power to change the terms of a Spending Clause agreement into which a State and Congress have entered.

States accepted the Title IV-A and Title IV-D funds after recognizing that (i) Congress also gave the Secretary discretion to suspend imposition of the penalty to allow a 'failing' State to achieve compliance; (ii) the "draconian" penalty of funds cut-offs would probably be reserved for the most egregious violations; (iii) the States still had political methods to persuade the Secretary to suspend or reduce penalties; (iv) compliance could be satisfied at a 75% rate; and (v) most importantly – *no other consequences existed.* It would be inappropriate to allow nonparties to the agreement (such as Respondents) to step in after the fact and demand sanctions in excess of those to which the contracting parties agreed.

II. THIS COURT SHOULD RECONSIDER *THIBOUTOT*.

1. In the 16 years since this Court decided *Thiboutot*, it has used two fundamentally inconsistent approaches to determining on an ad hoc basis whether a federal statute provides rights enforceable under § 1983. On one hand, in *Pennhurst I* this Court held that in Spending Clause legislation the conditions placed upon the States' receipt of federal grant funds (such as the amenability of States to private lawsuits to enforce federal rights) must be explicit. The Court reinforced the specificity requirement in *Suter* by mandating that Congress unambiguously confer any private rights. Thus, there can be *no* private enforcement absent an unambiguously clear statement by Congress authorizing such actions.

On the other hand, in *Wright* and *Wilder* a majority of the Court adopted a position much less favorable to the States. Under those decisions, courts may presume that § 1983 provides a basis for relief whenever the underlying federal law provides an entitlement that the court is comfortable in labeling as a "right." Thus, Respondents' rejoinder (Resp. Br. 35) that *Thiboutot* has generated only ten decisions by this Court wholly ignores the real, fundamental problem – the Court's two distinct lines of authority effectively permit lower courts

to choose the outcome in a case based on result rather than principle.

Predictably, this has led, as the petition and opening brief demonstrated, to a dizzying array of conflicting lower court opinions. *See*, *e.g.*, Pet. Br. App. C. Thus, Respondents' assertion that *Thiboutot* has not generated excessive work for this Court completely misses the point. *Thiboutot* has spawned extraordinary confusion, caused inordinate resources to be expended on the threshold provision-by-provision determination of the States' amenability to suit, and, in the process, caused severe damage both to State sovereignty and to separation of powers principles. Sixteen years of legal chaos is enough. The time has come to clarify § 1983.

2. Respondents and their *amici* misapprehend the import of *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), as it relates to the viability of the expansive interpretation of § 1983 first announced[9] in *Thiboutot*. On the basis of *Seminole Tribe*, § 1983 should not be construed to permit Respondents' suit against Arizona or any of its officers because Congress (1) enacted Title IV-D pursuant to its Article I spending power rather than its Fourteenth Amendment powers and (2) specifically identified the remedial scheme that if intended Title IV-D to include.[10]

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[9] Respondents' assertion (Resp. Br. 28) that *Thiboutot* did not break new ground is simply wrong. *See Suter v. Artist M.*, 503 U.S. 347, 355 (1992) ("first established" in *Thiboutot*).

[10] Respondents and the United States are incorrect in arguing that Petitioner's *Thiboutot* and Eleventh Amendment arguments were outside the scope of her petition for *certiorari*. *See* Resp. Br. 28-30, 44 n.3; S.G. Br. 11 n.11. This Court considers a question presented "to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). The modification of *Thiboutot* inheres in the question presented. In fact, Respondents understood in their opposition to the Petition that the Petition "loudly" disclosed the intent to limit cases like *Thiboutot*. Resp. Br. in Opp. 8. *See also* Pet. Br. 7 (stating that "[t]he time has come for the Court to decide the general availability of § 1983 to enforce federal nonconstitutional rights" as a reason to grant the petition). (Fn Continues)

Thiboutot's expansive construction of § 1983 is not viable in light of *Seminole Tribe*. Under *Thiboutot*, § 1983 creates a cause of action to enforce *any* federal right, whether arising out of the Constitution, a statute, or even an administrative regulation, and whether related to equal rights or not. According to Respondents, as long as some federal "law" creates a "right," § 1983 provides the remedy. Resp. Br. 10, 25. *Seminole Tribe* counsels that "laws" should be interpreted narrowly, in a manner that is more respectful of the States.

The Court's *Seminole Tribe* decision, which provides that courts should not imply remedial schemes against the States beyond those that Congress expressly provides in the rights-creating statute, establishes a basis for reexamining the *Thiboutot* decision. The Fourteenth Amendment allows Congress to act directly against the States. But generic use of § 1983 to enforce any federal "law" unrelated to the Fourteenth Amendment – such as Article I Spending Clause legislation like Title IV-D – carries grave consequences. For example, it relieves Congress of its obligation to make decisions for which it can be held accountable. In addition, it creates an inference that "without judicial enforceability, the States cannot be trusted to implement [statutory schemes]." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 528 (1990) (Rehnquist, C.J., dissenting). Also, it transfers the resolution

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(Fn Continued) Moreover, this Court has overruled decisions "of many years' standing although the parties did not urge such a holding in their briefs." *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 320-21 n.6 (1971). Indeed, in the context of § 1983, the Court in *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 663 (1978), overruled a portion of *Monroe v. Pape*, 365 U.S. 167 (1961), even though Petitioners there made clear that they sought "no such rejection of *Monroe*" and did not take issue with *Monroe's* "correctness." *Monell* Pet. Br. 33 (No. 75-1914, filed May 11, 1977); *Monell* Pet. Reply Br. 1 (filed Oct. 28, 1977). Here, by contrast, Petitioner's *Thiboutot* arguments are explicit and fully briefed. Similarly, the issue is fully addressed by Respondents and the United States.

of social ills to the judiciary, an institution that is neither designed for nor capable of providing such resolution. *See Missouri v. Jenkins*, 115 S. Ct. 2038, 2060-61 (1995) (O'Connor, J., concurring).

In addition to these profound consequences, *Thiboutot* engenders the federalism and separations of powers problems inherent in permitting federal courts to run State programs. All of these concerns call for this Court to review *Thiboutot* in light of *Seminole Tribe*. This Court should particularly address the level of clarity that a federal statute must provide before a federal court may enforce federal law against a State officer and exercise equitable powers to manage a State program.

If this Court's clear statement principles were applied to § 1983 actions, those actions would no longer serve as convenient vehicles for hauling State officials into federal court whenever a beneficiary of a federal statutory program was dissatisfied with the way a State was administering his or her case in a federal grant program. Instead, Congress would be forced to include a private right of action against the States and State officials within the Spending Clause legislation. This interpretation of § 1983 would return to Congress its institutionally proper role of deciding expressly when States can be sued rather than leaving the issue up to the judiciary to decide on ad hoc, case-by-case, and provision-by-provision analyses.

Petitioner has offered two alternative ways in which the Court could re-interpret § 1983. Restricting § 1983 to constitutional rights and civil rights laws would be most in keeping with *Seminole Tribe*'s holding and § 1983's Fourteenth Amendment roots. Pet. Br. 37-43. Alternatively, the Court could extend § 1983 beyond civil rights matters in nonconstitutional cases, but only to those cases in which the underlying statute contains an unambiguously conferred private right

of action. Pet. Br. 32-36. Such an interpretation would diminish some of the gross inconsistencies that *Thiboutot's* construction of § 1983 engenders: (i) it would accord proper weight to § 1983's protection of only those "rights" that are "secured" by law to an individual; (ii) it would bring § 1983 in line with the Court's post-*Thiboutot* emphasis on clear statement principles; and (iii) it would eliminate the existing anomaly that makes it easier to sue a State official under § 1983 than to sue a private individual through an implied cause of action, even though both causes of action hinge on an investigation into Congress' intent to create an enforceable right.

3. Respondents are incorrect in their assertion that Congress has ratified *Thiboutot's* construction of § 1983. *See* Resp. Br. 11 & n.11, 31-33. Since *Thiboutot*, Congress has not reenacted § 1983 or enacted any other legislation directly relevant to it.[11] Congressional *inaction* with respect to expressly overturning the *Thiboutot* decision provides no basis for a claim of *ratification*. The Court has long recognized that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also James v. United States*, 366 U.S. 213, 220-21 (1961).

Further, ratification by implication is as disfavored as repeal by implication. Thus, it is difficult to infer "ratification" where, as here, the set of unpassed bills that Respondents cited involved significantly more than the *Thiboutot* question. In fact, these bills presented four distinct and independently contentious issues.[12] Rather than representing a

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[11] In fact, the most recent amendment to § 1983 came in 1979, when Congress enlarged the scope of coverage to expressly include officials of the District of Columbia. Pub. L. No. 96-170, § 1, 93 Stat. 1284.

[12] These issues included: (1) the magnitude of civil rights claims after *Monell*, *Owen v. City of Independence*, 445 U.S. 622 (1980), and *Thiboutot*; (2) *Owen* and the need for derivative governmental immunity; (3) the availability of attorneys' fees under 42 U.S.C. § 1988; and (4)

carte blanche acceptance of *Thiboutot*, Congress' failure to reach agreement might reflect an unwillingness to overrule *Owen*, *Monell*, or the Civil Rights Attorney's Fees Act of 1976. *See United States v. Wise*, 370 U.S. 405, 411 (1962) ("[l]ogically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment").

Respondents are equally incorrect in contending (Resp. Br. 32-33) that Congress intended to ratify *Thiboutot* when it amended the amount-in-controversy limitation of 28 U.S.C. § 1331. Respondents' careful parsing of one sentence in a Senate Report does not constitute convincing evidence that Congress "*explicitly* adopt[ed]" *Thiboutot* when it eliminated the amount-in-controversy requirement. *See Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (emphasis added). Congress never mentioned *Thiboutot* in any of the relevant legislative history.[13] Conversely, Congress explicitly discussed the Supreme Court holdings that it intended the amendment to reflect.[14] The notion that Congress ratified *Thiboutot* by carefully *omitting* any reference to it when amending § 1331 is simply untenable.

Thiboutot and the possible limitation of § 1983 to civil rights laws. *See, e.g.*, 127 Cong. Rec. S1625 (daily ed. Feb. 26, 1981) (statement of Sen. Hatch on S. 3114 and S. 3115); 126 Cong. Rec. S12562-63 (daily ed. Sept. 15, 1980); 131 Cong. Rec. S1322-23 (daily ed. Feb. 7, 1985) (statement of Sen. Hatch on S. 436); 133 Cong. Rec. S922-23 (daily ed. Jan. 20, 1987) (statement of Sen. Hatch on S. 325); *Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong. 112-39 (1981) ("1981 Hearings") (attachment 1 to the prepared statement of National Institute of Municipal Law Offices).

[13] The citation to *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), in a Senate report footnote cannot bear the weight Respondents ascribe to it. *See* Resp. Br. 32. The footnote contains no parenthetical or other explanation to reveal the Senate's rationale for citing it. Such evidence can hardly lead to the conclusion that the Senate was affirmatively ratifying *Chapman*, let alone *Thiboutot*.

[14] *See, e.g.*, S. Rep. No. 96-827, at 5 n.9 (1980) (discussing *Monell*).

Next, Respondents claim that Congress ratified *Thiboutot* by enacting 42 U.S.C. §§ 1320a-2 and 1320a-10 in response to *Suter v. Artist M.*, 503 U.S. 347 (1992). The intended effect of those statutes is impossible to discern. *See* Pet. Br. 14 n.4, 48 & n.29. Moreover, their legislative history demonstrates that Congress was hotly divided and confused over the "*Suter* issue." *See* 140 Cong. Rec. S15024 (daily ed. Oct. 8, 1994). In fact, the only point upon which Congress *could* agree was that *Suter*'s actual holding was correct. *See* Pet. Br. 48 n.29. Unable to find any clarity or coherence in the "grounds" that existed pre-*Suter*, Congress could not discern which of *Suter*'s "grounds" were objectionable.[15] Thus, Congress passed an amendment that had little or no coherence. The *Suter* amendment's incomprehensible language makes it a "poor beacon to follow in discerning the proper" scope of § 1983. *Zuber v. Allen*, 396 U.S. 168, 185 n.5 (1969). It therefore sheds no light on *Thiboutot*. Moreover, it reflects just how futile it is for anyone to try to make sense of the cases post-*Thiboutot*, and thus reinforces the need for this Court to revisit the issue.

4. This Court has recognized that because the creation of causes of action is a quintessentially legislative function, it should not imply a cause of action in a statute that does not explicitly include one in the absence of some other clear expression of congressional intent. *See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) (refusing to imply a private cause of action for damages where Congress' express methods for enforcing the act in question made it "highly improbable that Congress absent-mindedly forgot to mention an intended private action") (citation and internal quotations omitted). *Thiboutot*'s presumption that a cause of action exists under § 1983 to vindicate federal

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[15] *See, e.g., Hearing Before the Subcommittee on Social Security and Family Policy of the Senate Committee on Finance*, 102d Cong., 6, 15, 44-53 (1992).

statutory rights unless Congress expressly or implicitly provides to the contrary created a situation in which courts are permitted to exercise a legislative function with respect to the existence of enforceable rights. Pet. Br. 31. By creating this class of quasi-implied causes of action, the Court permitted Congress to abdicate its legislative responsibility for creating enforceable rights. This in turn made Congress less accountable and removed the decisionmaking process from the legislative arena in which States and parents could have a voice in defining the rights in question and the way in which the rights would be enforced. The presumption also invited the courts to exercise their equitable powers to run state programs, creating the risk of divesting the Secretary of the ability to craft administrative solutions using her expertise in this area and of depriving the States of the ability to control and manage their own budgets.

Leaving the identification of enforceable rights to the courts also violates principles relating to federalism, separation of powers, and the States' right to receive clear notice that a particular Spending Clause statute includes rights enforceable under § 1983 prior to agreeing to participate in a federal grant program. The Court's recent *Seminole Tribe* decision concerning *Ex parte Young* reflects yet another instance in which this Court has demanded a clear statement from Congress before altering the delicate federal-state balance and imposing additional liabilities on States and their officials. See Pet. Br. 29-30. Demanding such precision from Congress where federalism concerns are present is hardly unusual, even in the context of § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (stating that "Congress should make its intention clear and manifest if it intends to pre-empt the historic powers of the States or if it intends to impose a condition on the grant of federal moneys") (internal quotations and citations omitted). The Court should once again demand this precision.

* * *

Under this Court's "clear statement" precedents of *Pennhurst I* ("unambiguous" "clear voice"), *Will* ("unmistakably clear"), and *Suter* ("unambiguously confer"), the Court should reverse the Ninth Circuit's decision. Because of the confusion concerning § 1983 that the other line of decisions, such as *Thiboutot*, *Wright*, and *Wilder*, have engendered regarding enforceable rights under § 1983, this Court should also announce an objective test that can be applied in future cases so the laws that Congress enacts can be applied uniformly across the Nation. Courts must stop guessing and speculating as to whether Congress intended to create liability, and – when dealing with § 1983 – must stop *presuming* a sovereign State's liability based solely on Congress' silence as to whether enforceable rights exist.

CONCLUSION

For the foregoing reasons and those set forth in Petitioner's opening brief, this Court should reverse the court of appeals' judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

LINDA J. BLESSING, DIRECTOR, ARIZONA DEPARTMENT OF ECONOMIC SECURITY, PETITIONER

v.

CATHY FREESTONE, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether an individual has a private right of action under 42 U.S.C. 1983 to seek redress against state officers responsible for administering a State's child support enforcement program under Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*, for violations of the Act and its implementing regulations.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Through Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*, Congress has made the needs of children and families for vigorous and effective child support enforcement a national priority. Title IV-D, which is administered by the Secretary of Health and Human Services, is one of the largest cooperative federal-state programs. More than 19 million people received child support services under Title IV-D in FY 1995, and the United States paid the States in excess of $2.0 billion for those services. The Title IV-D program has located millions of absent parents and helped hundreds of thousands of children identify their fathers. The nearly $40 billion in child support collected since 1990 alone has resulted in hundreds of thousands of families avoiding or leaving the welfare rolls, thereby reducing the human and financial toll of welfare dependence. See generally HHS, *Child Support Enforcement: Nineteenth Annual Report to Con-*

gress 2, 29-45 (1994). The United States has a strong interest in ensuring that the duties States voluntarily assume under Title IV-D are enforced in a manner that protects the rights of needy children and their parents, and at the same time avoids interference with federal oversight or with those areas of Title IV-D administration that Congress left to state discretion.

STATEMENT

1. Congress first required States to undertake child support enforcement efforts as a condition of receiving federal funds in 1950, under the Aid to Families with Dependent Children (AFDC) program. Ch. 809, § 321 (b), 64 Stat. 550. In 1968, Congress required States participating in AFDC to create an organizational unit for establishing paternity and collecting child support; enter into cooperative agreements with local officials to accomplish those goals and identify missing parents; and cooperate with other States in locating parents and enforcing support orders. Pub. L. No. 90-248, §§ 201(a)(1), 211(a), 81 Stat. 877-879, 896-897.

2. Congress's frustration with the lack of progress in child support enforcement culminated in the passage, in 1975, of Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.* Pub. L. No. 93-647, § 101, 88 Stat. 2337-2361 (1975 Act); see also S. Rep. No. 1356, 93d Cong., 2d Sess. 42-44 (1974). Congress concluded that "children have the right to receive support from their fathers," and that Title IV-D would "help children attain this right, including the right to have their fathers identified so that support can be obtained." S. Rep. No. 1356, *supra*, at 42. The 1975 Act envisioned "a far more active role on the part of the Federal Government" in monitoring state programs and directly assisting the States' enforcement of children's rights. *Id.* at 2.

The 1975 Act required States participating in AFDC to "have in effect a plan approved under [Title IV-D] and operate a child support program in conformity with such plan." § 101(c)(5)(C), 88 Stat. 2360. Each State must provide services to locate noncustodial parents and establish the paternity of and secure support for children receiving AFDC benefits. 42 U.S.C. 654(4) and (8).[1] AFDC recipients must assign their support rights to the State and cooperate in enforcement efforts. 42 U.S.C. 602(a)(26).[2] Amounts recovered generally are retained by the State to reimburse it and the federal government for AFDC assistance provided to the family. 42 U.S.C. 657(a)-(b). Congress required States to provide services to non-AFDC families as well, 42 U.S.C. 654(6), although those families are not required to assign their support rights, 45 C.F.R. 302.33(e), and any child support the State collects must be paid to the family, 42 U.S.C. 657(a)(4)(B).

Congress agreed to pay 75% of the States' administrative costs under Title IV-D. 1975 Act, § 101(a), 88 Stat. 2355-2356. Congress also provided incentive payments for successful collection efforts. 42 U.S.C. 658. The 1975 Act directed the Secretary to establish standards for state programs in locating absent parents, establishing paternity, and obtaining child support "as [s]he determines to be necessary to assure that such programs will be effective," and to set organizational and staffing requirements for state child support offices. 42 U.S.C. 652(a)(1)-(2); see S. Rep. No. 1356, *supra*, at 46-47. The 1975 Act also established a federal Parent Locator Service utilizing federal and state records. 42 U.S.C. 652(a)(9), 653. The Secretary was charged with annually approving and auditing state programs. 42 U.S.C. 652(a)(3)-(4). If a State's program was found to be deficient, its federal Title IV-A (primarily AFDC) allotment was to be re-

[1] Unless otherwise indicated, references to the United States Code are to the 1994 edition, which predates the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, discussed *infra*.

[2] Once assigned, the support obligation is owed to the State and is collectible under all applicable state processes. 42 U.S.C. 656(a)(1). The custodial parent retains the right to enforce the obligation, although any payments obtained must be turned over to the State to the extent of AFDC payments received. 42 U.S.C. 602(a)(26)(A); 45 C.F.R. 232.12(b)(4).

duced by 5%. 1975 Act, § 101(c)(6)(A), 88 Stat. 2360.[3]

3. By the mid-1980s, more than $10.8 billion in child support had been collected under Title IV-D, annual collections had nearly quadrupled, and state and local revenues had grown by more than $300 million. S. Rep. No. 387, 98th Cong., 2d Sess. 11 (1984). Nevertheless, Congress found that there remained "a critical lack of child support enforcement," which had "a critical impact on the health and welfare of the children of the Nation." Pub. L. No. 98-378, § 23(a)(2), (5), 98 Stat. 1329. Congress was concerned that, by measuring their success "solely in terms of welfare savings," many States were disinclined to assist non-AFDC families. H.R. Rep. No. 527, 98th Cong., 1st Sess. 29 (1983). Congress amended Title IV-D in 1984 to ensure, "through mandatory income withholding, incentive payments to States, and other improvements in the child support enforcement program, that all children in the United States who are in need of assistance in securing financial support from their parents will receive such assistance regardless of their circumstances."

[3] In 1976, Congress required state employment agencies to provide the addresses of absent parents to the State's child support agency. Pub. L. No. 94-566, § 508, 90 Stat. 2689. In 1980, Congress (i) funded 90% of state costs of developing automated information systems; (ii) expanded incentive payments to the States; (iii) funded enforcement activities of certain state court personnel; (iv) gave States access to wage information held by the federal government and state employment offices; and (v) expanded the authority of the Internal Revenue Service (IRS) to collect child support arrearages. Pub. L. No. 96-265, §§ 402-405, 408, 94 Stat. 462-465, 468-469; Pub. L. No. 96-272, §§ 301, 307, 94 Stat. 527, 531. In 1981, Congress authorized the IRS to withhold tax refunds of persons delinquent in their child support obligations, 42 U.S.C. 664; 26 U.S.C. 6402, and directed States to withhold a portion of unemployment benefits from such parents. Pub. L. No. 97-35, § 2335, 95 Stat. 863-864. Amendments in 1982 reduced federal funding to 70%, permitted collections from military personnel, and provided for disclosure of information obtained under the food stamp program. Pub. L. No. 97-248, §§ 171-176, 96 Stat. 401-404; Pub. L. No. 97-253, § 169, 96 Stat. 779.

Pub. L. No. 98-378, preamble, 98 Stat. 1305; see also *id.* § 23(a)(3), 98 Stat. 1329.

The 1984 amendments required States to adopt laws and procedures providing for (i) mandatory wage withholding; (ii) expedited processes for obtaining and enforcing support orders; (iii) state income tax refund intercepts; (iv) property liens for overdue support; (v) establishment of paternity any time prior to a child's eighteenth birthday; (vi) posting of bonds to secure payment of overdue support; (vii) reporting overdue support to consumer credit agencies; and (viii) withholding overdue support from wages without further judicial order. 42 U.S.C. 666(a)(1)-(8), (b); see S. Rep. No. 387, *supra*, at 26-30. States are required to have those laws "in effect" and to "implement the[ir] procedures," and to establish statewide guidelines for child support amounts. 42 U.S.C. 654(20), 667.[4]

At the same time, Congress reduced the frequency and inflexibility of the Secretary's administrative oversight.[5] With the exception of States under penalty, audits were made triennial, 42 U.S.C. 652(a)(4), and Title IV-A penalties were based on a State's failure to attain "substantial compliance," rather than "full compliance," with Title IV-D requirements, 42 U.S.C. 603(h)(1); see also 42 U.S.C. 602(a)(27). A State is in "substantial compliance" if "the Secretary determines that any noncompliance * * * is of a technical nature which does not adversely affect the performance of the child support enforcement program." 42 U.S.C. 603(h)(3).[6] Congress

[4] Because interstate cases present "one of the most difficult areas of child support enforcement," S. Rep. No. 387, *supra*, at 34, Congress provided grants for state programs that improve interstate enforcement. 42 U.S.C. 655(e); see also 42 U.S.C. 658(d) (incentive credits for both States in interstate collections).

[5] Congress also reduced federal funding to a final floor of 66%, which is the current level for most administrative costs. 42 U.S.C. 655(a)(2). Matching funds at the 90% level were retained for automating data processing systems. 42 U.S.C. 655(a)(1)(B).

[6] The Secretary has interpreted "substantial compliance" as: (A) full compliance with requirements that services be offered

replaced the flat 5% penalty with a system of graduated penalties, ranging from 1% to 5% of total IV-A funds, and allowed States to avoid penalties by timely submission and successful implementation of corrective plans. 42 U.S.C. 603(h)(1), (2)(A) and (B).[7] Those changes shifted the focus of federal oversight to overall programmatic performance. S. Rep. No. 387, *supra*, at 32. In so doing, Congress was "not abandoning the[] requirements of existing law but rather expect[ed] them to be more fully carried out." *Id.* at 33.

4. In 1988, Congress again amended Title IV-D to increase state duties and performance levels. S. Rep. No. 377, 100th Cong., 2d Sess. 8 (1988). States were required to implement "new and more stringent provisions for wage withholding" and periodically review and adjust individual support awards. *Id.* at 15; 42 U.S.C. 666(a)(8) and (10), (b)(3). Congress directed the States to adopt automated case tracking systems and continued 90% federal funding for them. 42 U.S.C. 654(24). States also were required to inform AFDC families monthly of collections on their behalf, 42 U.S.C. 654(5), and to adhere to state guidelines for setting child support awards, 42 U.S.C. 667(b). Congress directed the Secretary to adopt regulations setting specific time limits for States to accept and respond to requests for services, locate absent parents, establish paternity, initiate child support proceedings, and collect and distribute child support,

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statewide and that certain recipients be notified monthly of the support collected, as well as with reporting, record-keeping, and accounting rules; (B) 90% compliance with case opening and case closure criteria; and (C) 75% compliance for most remaining program functions. 45 C.F.R. 305.20. Since 1988, "substantial compliance" has also required States to succeed in establishing paternity in a specified percentage of cases. 42 U.S.C. 652(g).

[7] A State's failure to submit a plan that conforms to Title IV-D's state plan requirements can also result in denial of federal funds under Title IV-D itself. See 45 C.F.R. 301.13; see also 45 C.F.R. 74.22(h)(1), 74.61, 74.62; 45 C.F.R. Pt. 74, App. J.

42 U.S.C. 652(h)-(i).[8] Finally, Congress set federal standards for establishing paternity that, if not met, would result in a reduction in AFDC funds. 42 U.S.C. 652(g).[9]

5. a. On August 22, 1996, the President approved the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996 Act). As relevant here, the 1996 Act transformed AFDC into a block-grant program. Recipients now face a five-year cap on benefits, and Title IV-A does not "entitle any individual or family to assistance under any State program funded under this part." *Id.* § 103(a)(1), 110 Stat. 2113, 2137 (to be codified at 42 U.S.C. 601(b), 608(a)(7)). Similar language regarding the Title IV-D program was proposed (see H.R. 4, 104th Cong., 1st Sess. § 302 (1995)), but not enacted. The requirement under Title IV-A that States operate their child support programs in "substantial compliance" with Title IV-D has been replaced; States now must certify that they "will operate a child support enforcement program under the State plan approved under part D." 1996 Act, § 103(a)(1), 110 Stat. 2114 (to be codified at 42 U.S.C. 602(a)(2)). But the 1996 Act retained the framework of graduated penalties under Title IV-A for failure to comply substantially with Title IV-D's requirements. *Id.* at 2145 (to be codified at 42 U.S.C. 609(a)(8)).

b. Although the 1996 Act transformed numerous welfare programs into block grants, Congress left Title IV-D intact and, indeed, increased state responsibilities under

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[8] See 45 C.F.R. Pt. 303. The Secretary has consulted extensively with state child support enforcement officials in establishing these standards and timeframes. See 54 Fed. Reg. 15,877-15,878 (1989).

[9] See also 42 U.S.C. 666(a)(5)(B) (genetic testing made available in contested paternity cases); 42 U.S.C. 655(a)(1)(C) (90% federal funding for paternity tests). In 1993, Congress increased the percentage of children for whom the State must establish paternity annually. 42 U.S.C. 652(g). Congress also mandated that States establish simplified civil procedures, including hospital-based programs, for voluntary acknowledgment of paternity. 42 U.S.C. 666(a)(5)(C); see generally H.R. Rep. No. 111, 103d Cong., 1st Sess. 487-489 (1993).

the program. The 1996 Act amended the rules governing distribution of collections to give priority to families who have left the welfare rolls. § 302(a), 110 Stat. 2200 (to be codified at 42 U.S.C. 657(a)(2)). Each State must establish a directory of new hires, a central registry of support orders, and centralized collection and disbursement units. *Id.* §§ 311, 312(a), 313(a), 110 Stat. 2205, 2207, 2209 (to be codified at 42 U.S.C. 654(27) and (28), 654a(e)). Congress set strict time limits for States to distribute support collections, notify employers to withhold child support, and take administrative enforcement action in interstate cases. *Id.* §§ 312(b), 313(b), 323, 110 Stat. 2208, 2211, 2222 (to be codified at 42 U.S.C. 653a(g)(1), 654b(c)(1), 666(a)(14)).

The 1996 Act directed States to adopt more streamlined processes for establishing paternity and to employ more rigorous child support enforcement techniques, such as automatic liens and suspension of driver's and professional licenses. §§ 314, 331(a), 368, 369, 110 Stat. 2212-2214, 2227-2230, 2251 (to be codified at 42 U.S.C. 666(a)(1), (4)(A), (5) and (16), (b)). In addition, States must adopt expedited procedures for (i) genetic testing; (ii) access to financial information and government records; (iii) mandatory income withholding; (iv) securing assets; and (v) increasing monthly payments in cases of arrearages. *Id.* § 325(a), 110 Stat. 2224 (to be codified at 42 U.S.C. 666(a)(2) and (c)). Support orders must be reviewed and updated upon request every three years, and States must give families notice of relevant proceedings and copies of orders, notice of right to seek review, and, upon request, information on the status of payments. *Id.* §§ 304(a), 312(b), 351, 110 Stat. 2205, 2208, 2239, 2240 (to be codified at 42 U.S.C. 654(12), 654b(b)(4), 666(a)(10)(A) and (C)).

c. The 1996 Act overhauled audit procedures and directed the Secretary to establish a new performance-based incentive and penalty program. §§ 341(a), 342(b), 110 Stat. 2231, 2233-2234 (to be codified at 42 U.S.C. 652(a)(4), 658 note). A State now must submit annual reports documenting that its program is "operated in compliance with" Title IV-D, and the State's review must employ standards and procedures set by the Secretary. *Id.* § 342(a)(3), 110 Stat. 2233 (to be codified at 42 U.S.C. 654(15)). The Secretary's triennial audit must assess the "completeness, reliability, and security of the data and the accuracy of the [State's] reporting systems"; "the adequacy of financial management"; and "whether collections and disbursements of support payments are carried out correctly," and it may pursue "such other purposes as the Secretary may find necessary." *Id.* § 342(b), 110 Stat. 2233-2234 (to be codified at 42 U.S.C. 652(a)(4)(C)).[10]

6. Arizona has elected to participate in the AFDC and Title IV-D programs and has submitted plans assuring that it will operate a child support enforcement program in accordance with Title IV-D's requirements. Based on those commitments, Arizona has received approximately $1.4 billion in AFDC funds and more than $222 million in Title IV-D funds from the federal government since 1976.

SUMMARY OF ARGUMENT

A. This Court should not reconsider *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). Principles of *stare decisis* counsel strongly against overruling a 16-year-old precedent that this Court unanimously reaffirmed two Terms ago. In any event, Congress twice ratified *Thiboutot* and its progeny in 1994.

B. Petitioner's invocation of "principles of federalism" is misplaced. Title IV-D is a voluntary program through which Congress has given the States billions of dollars and developed a nationwide child support enforcement

[10] The Department of Health and Human Services is currently evaluating the impact of the 1996 Act on the Title IV-D program and assessing what regulatory changes are necessary or appropriate to interpret and implement its provisions. We have been informed by the Department that, in its judgment, the 1996 Act will require substantial revisions in performance incentives, standards and procedures for audits, and the definition of "substantial compliance" as the basis for penalties under Title IV-A.

infrastructure. The growing interstate character of the child support problem and the need for uniform enforcement call for a substantial federal role. The 1996 Act, moreover, demonstrates that Congress is responsive to federalism concerns in welfare administration. Under Title IV-D, however, Congress chose to strengthen the standards governing state programs. Enforcement of those standards in an action against state officials under 42 U.S.C. 1983 is fully consistent with *Ex parte Young*, 209 U.S. 123 (1908), and does not contravene the Eleventh Amendment.

C. Title IV-D's text, structure, and legislative history establish that it creates enforceable rights in the individuals who seek child support services from a State. Its primary purpose is to provide children with much-needed child support services, which give them an opportunity to establish familial relationships with both parents and avoid a childhood pervaded by economic hardship. In addition, a number of provisions of Title IV-D and its implementing regulations speak in specific and mandatory terms that are well within the competence of courts to enforce.

Petitioner argues that Title IV-D's "substantial compliance" floor for avoiding administrative penalties enables a State to ignore 25% of the children and families seeking its services. But Congress's employment of a flexible measure of programmatic performance to undergird the funding relationship between governments does not mean that Congress no longer expected full adherence to Title IV-D's requirements in a State's furnishing of child support services to particular beneficiaries. Petitioner's claim that Congress should have warned that a Section 1983 action would be available is also without merit, because Section 1983's text, reinforced by recent Acts of Congress and this Court's precedents, provided ample notice.

Not all of Title IV-D's provisions, however, are judicially enforceable to the same degree. Congress preserved state discretion in some areas, such as selecting appropriate collection tools and initiating judicial proceedings.

Whether a Section 1983 action is available thus will depend on which aspect of the State's program is at issue and the nature of the relief sought in a given case.

The Secretary's generalized audit procedures do not preclude Section 1983 remedies, especially where, as here, there is no alternative avenue through which individuals can enforce their rights. The availability of relief under Section 1983 in appropriate circumstances will complement the Secretary's oversight and promote Congress's goal of effective and uniform child support enforcement across the Nation.

ARGUMENT

TITLE IV-D CREATES INDIVIDUAL RIGHTS THAT MAY BE ENFORCED IN AN ACTION UNDER 42 U.S.C. 1983

A. *Maine* v. *Thiboutot* Should Not Be Reconsidered

Section 1983 creates a private cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. This Court held in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), that Section 1983 authorizes suits by private individuals against state actors who violate rights created by federal statutes, specifically including the Social Security Act. *Id.* at 4-8. Petitioner asks (Br. 32) this Court to "reconsider" *Thiboutot* and limit sharply the federal laws that may be enforced under Section 1983. There is no basis for doing so.[11]

Principles of *stare decisis* counsel strongly against unraveling more than a decade and a half of precedent. "[*S*]*tare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters re-

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[11] Petitioner did not present this issue in her petition for certiorari. Sup. Ct. R. 14.1(a). The petition did not mention *Thiboutot*, let alone urge that it be reconsidered. The question presented suggested only that permitting an action under Section 1983 would "contravene this Court's precedents" (see Pet. i), not that seminal precedent in this area would have to be reconsidered for petitioner to prevail.

liance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793, 1801 (1996) (internal quotation marks omitted). Both the doctrine and its underlying purposes apply with "special force" to issues of statutory construction. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989). This Court's "reluctance to overturn [statutory construction] precedents derives in part from institutional concerns about the relationship of the judiciary to Congress," for Congress is always free to correct the Court's interpretation of the laws it passes. *Neal* v. *United States*, 116 S. Ct. 763, 769 (1996).

Consequently, this Court will overrule precedent construing a federal statute only if (i) intervening law has undercut the "conceptual underpinnings" of the decision; (ii) "later law has rendered the decision irreconcilable with competing legal doctrines or policies"; or (iii) the Court is provided "compelling evidence bearing on Congress' original intent." *Neal*, 116 S. Ct. at 769. None of those "special justification[s]" is present here. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). Quite the opposite is true.

Intervening law has repeatedly followed and reaffirmed *Thiboutot*. Just two Terms ago, this Court unanimously reconfirmed and applied *Thiboutot*'s holding in *Livadas* v. *Bradshaw*, 114 S. Ct. 2068, 2083 (1994). No Justice has suggested that *Thiboutot* should be reexamined, and *Thiboutot* has come to occupy an active and vital position in the law, as petitioner recognizes. See Pet. Br. App. C. Petitioner offers no new or compelling evidence of Congress's original intent to suggest that Section 1983 no longer "means what it says" (*Thiboutot*, 448 U.S. at 4).[12]

[12] Petitioner's suggestion (Br. 31) that *Thiboutot* is "in conflict" with precedent concerning implied rights of action ignores the difference between the two inquiries:

> [The implied cause of action inquiry] reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes. Because § 1983 provides an "alternative source of *express* congressional authorization of private suits," these separation-of-powers concerns are not present in a § 1983 case. *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) (citations omitted). Indeed, it would be inconsistent with the separation of powers to require that courts themselves find an implied right of action before giving effect to an express cause of action enacted by Congress.

In any event, in 1994, Congress twice ratified *Thiboutot* and its progeny—in 42 U.S.C. 1320a-2, and then in 42 U.S.C. 1320a-10.[13] In the text of those provisions, Congress made clear that a cause of action is available to enforce provisions of the Social Security Act consistent with this Court's precedents predating *Suter* v. *Artist M.*, 503 U.S. 347 (1992), which of course include *Thiboutot*. See H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994) ("The intent of this provision is to assure that individuals who have been injured by a State's failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in the federal courts to the extent they were able to prior to * * * *Suter* v. *Artist M.*"); 140 Cong. Rec. S15,024 (daily ed. Oct. 8, 1994) (Sen. Rockefeller).[14] This

[13] Section 1320a-2 (like Section 1320a-10) provides:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., [503 U.S. 347] (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 671(a)(15) of this title is not enforceable in a private right of action.

[14] Congress previously had amended 28 U.S.C. 1331 to remove the amount-in-controversy requirement, predicated on *Thiboutot*'s recognition of a Section 1983 action to enforce federal statutes. See Pub. L. No. 96-486, 94 Stat. 2369; S. Rep. No. 827, 96th Cong., 2d Sess. 5 & nn.8-9 (1980).

Court's pre-*Suter* precedents therefore must continue to govern the availability of suits under Section 1983 to enforce provisions of the Social Security Act.

B. Private Enforcement Comports With Principles Of Federalism And The Eleventh Amendment

1. Petitioner's invocation of "principle[s] of federalism" (Br. 24) to bar recognition of a Section 1983 action must be placed in context. Title IV-D is one of the most generous federal spending programs in existence, financing from 66% to 90% of the States' child support enforcement efforts. Indeed, most States profit from their Title IV-D programs.[15] This case, therefore, is primarily about how *federal* money is spent. "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

Child support enforcement, moreover, is not an area of purely local concern. Interstate cases present "one of the most difficult areas of child support enforcement." S. Rep. No. 387, *supra*, at 34. The mobility of absent parents makes cooperation among States and uniform national enforcement standards of critical importance. See, *e.g.*, *id.* at 27; 142 Cong. Rec. H7759 (daily ed. July 17, 1996) (Rep. Roukema) (noting "absolute requirement for interstate enforcement of child support, because the current, State-based system is only as good as its weakest link").[16]

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[15] In 1994, States realized $484 million in savings, at a cost to the federal government of nearly $1 billion. See *Nineteenth Annual Report* 77-78; Staff of House Comm. on Ways and Means, 103d Cong., 2d Sess., *Overview of Entitlement Programs: 1994 Green Book* 494-499 (Comm. Print 1994) (WMCP:103-27).

[16] This case thus stands in sharp contrast to *Suter*, in which the Secretary, consistent with congressional intent, rejected national standards and opted to permit States substantial flexibility to tailor their efforts to the needs of each case. 503 U.S. at 360-363.

Finally, the administration of welfare programs is an area in which Congress itself has been responsive to the States' interests and deferred to state autonomy when it found that cause appropriate. The 1996 Act vividly demonstrates that the political process can address state concerns about excessive regulation, entitlements, unfunded mandates, and impediments to experimentation. Congress's decision in the same Act to carve Title IV-D out for *more* directive treatment reflects a deliberate determination that the problem of child support in this Nation can be combatted effectively only through a closely coordinated, comprehensive, and vigorously enforced federal-state program. See H.R. Rep. No. 651, 104th Cong., 2d Sess. 1331 (1996).

2. The Eleventh Amendment bars suits against States, not against state officers. Almost 90 years ago, this Court held that the Eleventh Amendment does not bar suits for injunctive relief against state officers. *Ex parte Young*, 209 U.S. 123, 155-157 (1908). That decision has been consistently reaffirmed. See, *e.g.*, *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1132 (1996); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989); see also *Edelman* v. *Jordan*, 415 U.S. 651, 664-668 (1974) (*Ex parte Young* suit permitted to enforce provisions of Social Security Act). Respondents have not named the State of Arizona or one of its agencies as a defendant in this action. The suit is brought against a state official seeking only injunctive and declaratory relief. The suit thus falls squarely within the traditional boundaries of *Ex parte Young* and does not transgress the Eleventh Amendment.[17]

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[17] Much of petitioner's argument stems from a concern that courts should not enforce Title IV-D's "substantial compliance" provision, because relief necessarily would operate against the State, not a state official. As we argue below (see p. 20, *infra*), however, the "substantial compliance" provision is not enforceable under Section 1983. On the other hand, a suit seeking compliance with a provision of Title IV-D that is enforceable by custodial

Petitioner's reliance (Br. 26-30) on *Seminole Tribe* is misplaced. The *Ex parte Young* aspect of that decision was based on statutory construction, not constitutional limitations. 116 S. Ct. at 1133 & n.17. Because "Congress ha[d] prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right," the Court concluded that Congress did not intend to permit an *Ex parte Young* suit. *Id.* at 1132. Here, by contrast, there is no "carefully crafted and intricate remedial scheme" that would be rendered "superfluous" (*id.* at 1132, 1133) by permitting private enforcement under Section 1983. Unlike the statute at issue in *Seminole Tribe*, Title IV-D contains no alternative avenue for judicial enforcement by non-federal parties in a suit directly against the State itself, and private suits against state officials under Section 1983 in appropriate circumstances would complement the Secretary's programmatic audit and enforcement powers.

C. Title IV-D Creates Judicially Enforceable Rights

Not every violation of a federal statute constitutes the deprivation of a "right * * * secured by federal law" within the meaning of Section 1983. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). The statute in question must create judicially enforceable rights. *Ibid.*; see also *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 15-30 (1981). A federal statute creates an enforceable "right" if (i) Congress intended the provision in question to benefit the putative plaintiff; (ii) the provision is binding and mandatory on the States, rather than precatory; and (iii) the right is not beyond the competence of the judiciary to enforce. *Wilder*, 496 U.S. at 509; *Golden State*,

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parents and children will necessitate nothing more than the typical *Ex parte Young* relief: an injunction directing agency officials to perform specific duties that are spelled out in the Act and regulations.

493 U.S. at 106. All three factors weigh in favor of finding enforceable rights under Title IV-D.[18]

1. Needy Children And Their Custodial Parents Are Title IV-D's Intended Beneficiaries

Title IV-D's plain language identifies children and custodial parents in need of support services as the intended beneficiaries. Congress enacted the program "[f]or the purpose of enforcing the support obligations owed by absent parents to their children and the spouse * * *, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children." 42 U.S.C. 651. Title IV-D offers free (or highly subsidized) child support services to all persons in need of such assistance,[19] and individuals have a right to receive those services regardless of whether they

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[18] Prior to the 1988 amendments, the Secretary took the position that there was no right of action under Section 1983 to enforce Title IV-D. The Secretary has reconsidered that position in light of the amendments in 1988 and later years. Most courts that have considered the question have held that Title IV-D creates enforceable rights. See *Howe* v. *Ellenbecker*, 8 F.3d 1258, 1262-1263 (8th Cir. 1993), cert. denied, 114 S. Ct. 1373 (1994); *Albiston* v. *Maine Comm'r of Human Servs.*, 7 F.3d 258, 264-268 (1st Cir. 1993); *Carelli* v. *Howser*, 923 F.2d 1208, 1210-1212 (6th Cir. 1991); *King* v. *Bradley*, 829 F. Supp. 989, 992-995 (N.D. Ill. 1993); *Behunin* v. *Jefferson County Dep't of Social Servs.*, 744 F. Supp. 255, 257-258 (D. Colo. 1990); *Beasley* v. *Harris*, 671 F. Supp. 911, 920-922 (D. Conn. 1987); *Davis* v. *McClaran*, 909 S.W.2d 412, 416-417, 419-420 (Tenn. 1995), cert. denied, 116 S. Ct. 1370 (1996); see also *Wehunt* v. *Ledbetter*, 875 F.2d 1558, 1568-1577 (11th Cir. 1989) (Clark, J., dissenting), cert. denied, 494 U.S. 1027 (1990). But see *Wehunt*, 875 F.2d at 1565-1566; *Mason* v. *Bradley*, 789 F. Supp. 273, 276-277 (N.D. Ill. 1992); *Oliphant* v. *Bradley*, No. 91 C 3055, 1992 WL 153637, at *5-*7 (N.D. Ill. Feb. 20, 1992).

[19] The application fee charged non-AFDC families is nominal and often paid by the State. 42 U.S.C. 654(6); 45 C.F.R. 302.33. According to its state plan, Arizona charges a $1 fee, which the State pays, and does not recoup collection costs from the family.

will ultimately prove beneficial.[20] Thus, the rights secured by Title IV-D are similar to a statutory right to educational or medical services, which individuals may receive even if they may not actually learn or enjoy better health as a result. See, *e.g.*, *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). The right to child support services has recently taken on added importance because the 1996 Act's five-year cap on welfare benefits makes the opportunity for families to secure alternative income sources particularly valuable.[21]

The legislative history confirms that Title IV-D is "a bill of rights for children" and custodial parents. 121 Cong. Rec. 26,541 (1975) (Sen. Nunn). The 1975 Senate Report declared that "children have the right to receive support from their fathers"; that Title IV-D will "help children attain this right, including the right to have their fathers identified so that support can be obtained"; and that Title IV-D's vigorous implementation will "deter[] [parents] from deserting their families to welfare and children will be spared the effects of family breakup." S. Rep. No. 1356, *supra*, at 42. The 1984 amendments reaffirmed Congress's commitment to chil-

[20] Many of Title IV-D's provisions speak in terms of state obligations running to individuals. See, *e.g.*, 42 U.S.C. 654(4) ("State will" provide paternity services to "each child"), 654(5) (individual notification and right to request review of order), 654(6) (child support and paternity services available to any individual), 657 (outlining distribution of collections to families); 1996 Act, §§ 304(a), 312(b), 110 Stat. 2205, 2208 (to be codified at 42 U.S.C. 654(12), 654b(b)(4)) (right of "individuals" to notice of proceedings and information about support collected).

[21] Petitioner's reliance (Br. 16-17) on *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973), is misplaced. Respondents do not seek to compel state officials to bring a criminal prosecution or civil action, and they do not rely on a non-statutory interest in child support services. Respondents instead seek to enforce a federal statutory right to services due from the State, even if those services may not, in turn, succeed in obtaining support payments. Cf. *id.* at 617 n.3 ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").

dren and their custodial parents. H.R. Rep. No. 527, *supra*, at 29 (Title IV-D is "aimed at serving children"); S. Rep. No. 387, *supra*, at 6. Finally, while the 1996 Act provides that some provisions of the Social Security Act do not create individual entitlements (1996 Act, § 103(a)(1), 110 Stat. 2113 (to be codified at 42 U.S.C. 601(b)), similar language with respect to Title IV-D was not enacted. See H.R. 4, *supra*. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown* v. *Gardner*, 115 S. Ct. 552, 556 (1994); accord *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 100 (1993) ("we are mindful that Congress had before it, but failed to pass, just such a scheme").

Petitioner is wrong in arguing (Br. 15, 20-21, 26) that Congress enacted Title IV-D primarily to benefit the public fisc by reducing welfare expenditures. Nothing in Title IV-D's stated purpose or text evinces such a narrow focus, and the requirement that States offer their services to non-AFDC beneficiaries (who now outnumber AFDC beneficiaries, *Nineteenth Annual Report* 118) refutes that contention. The 1984 amendments responded to congressional concern that States measured their success "solely in terms of welfare savings," since "[t]he objectives behind the program are greater than merely recouping federal and state AFDC expenditures." H.R. Rep. No. 527, *supra*, at 29-30. Congress intended Title IV-D to effectuate "the larger societal responsibility for making sure that all children receive financial support from both their parents to the fullest extent possible." *Id.* at 30; see also S. Rep. No. 1356, *supra*, at 42 (protection of children is "more important[]" than potential financial benefit to government); 130 Cong. Rec. 9843 (1984) (Sen. Dole). The 1996 Act reaffirms that Title IV-D's "fundamental goal * * * is to increase the finan-

cial security of children." H.R. Rep. No. 651, *supra*, at 1440.

Certain of Title IV-D's provisions, however, do not give rise to enforceable rights because they do not provide for specific child support services or confer individual benefits. See *Golden State*, 493 U.S. at 106 (plaintiff must show that "the provision in question" benefits her). In particular, the requirement that a State operate its child support program in "substantial compliance" with Title IV-D does not create a right running to individuals. Rather, "substantial compliance" establishes a floor below which a State program's performance warrants the assessment of financial penalties by the federal government. See, *e.g.*, *Albiston* v. *Maine Comm'r of Human Servs.*, 7 F.3d 258, 266 (1st Cir. 1993) (substantial compliance "is not * * * the measure of what the regulations require; it is intended to measure how great a failure to meet those requirements should cause funds to be cut off") (quoting *Withrow* v. *Concannon*, 942 F.2d 1385, 1387 (9th Cir. 1991)); cf. *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 663-664 (1985). Indeed, the phrase appears in Title IV-A and IV-D only in penalty provisions. See 42 U.S.C. 652(g); 1996 Act, § 103 (a)(1), 110 Stat. 2145 (to be codified at 42 U.S.C. 609(a)(8)).[22] Because achieving "substantial compliance" on a program-wide basis is not a distinct child support service for any individual child or parent, the court of appeals erred in finding that standard enforceable under Section 1983. See Pet. App. 14a-15a, 18a.

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[22] Prior to the 1996 Act, a reference to "substantial compliance" was included in the provision obligating States participating in AFDC to maintain a Title IV-D program. 42 U.S.C. 602(a)(27). The 1996 Act reconfirmed that "substantial compliance" is a penalty trigger by deleting the phrase from Section 602(a)(27) and confining it to the penalty provision. 1996 Act, § 103(a)(1), 110 Stat. 2145 (to be codified at 42 U.S.C. 609(a)(8)).

2. *Title IV-D's Requirements Are Clear And Mandatory*

a. Because the enforceable provisions of Title IV-D are concrete, mandatory, and binding, they provide States with ample notice of the services they must provide as a condition of receiving federal funds. See *Golden State*, 493 U.S. at 106. Title IV-D lists 33 specific requirements that state plans "must provide" for the State to receive Title IV-A and IV-D funds. 42 U.S.C. 654 (*e.g.*, paternity establishment, parent locator service, payment distribution order, collection of overdue child support, interception of federal income tax refunds; services "shall" be made available to non-Title IV-A families). Title IV-D also lists 22 laws that States "must have in effect" (42 U.S.C. 666), and provides that States "shall implement" the procedures under those laws (42 U.S.C. 654(20)); see also 42 U.S.C. 657 (directing how collections "shall be distributed"), 667 (States "must establish guidelines" for child support awards). Likewise, Title IV-D provides for the establishment of time limits within which States "must accept and respond to" requests for services and "must distribute" funds collected. 42 U.S.C. 652(h) and (i). Compare *Wilder*, 496 U.S. at 512 (requirement that state plan "must provide" for specified manner of payment is mandatory and binding).[23]

By contrast, when Congress wished only to encourage state action or to make certain Title IV-D program components and services optional, it spoke in non-binding, precatory terms. See 42 U.S.C. 654(21)(A) (imposition of fees is "at the option of the State"), 668 (States "encouraged" to adopt simplified civil process for paternity establishment in contested cases); 1996 Act, § 904, 110 Stat. 2349 ("sense of the Senate" that States should pursue efforts and adopt pilot programs to collect support

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[23] The regulations speak in equally mandatory terms. See 45 C.F.R. Pts. 302 (listing what States "shall provide"), 303 (listing services States "must" provide and timeframes that "must" be met).

from unemployed parents or those who refuse to pay); Pub. L. No. 98-378, § 23(a)(2) and (5), (b)(1), 98 Stat. 1329-1330 ("sense of the Congress" that States should develop measures to enhance enforcement).

b. Title IV-D's requirements are not only mandatory, but are also spelled out in concrete and specific terms so that States know precisely what is expected of them. Cf. *Suter*, 503 U.S. at 359-360 (no enforceable right where neither federal statute nor regulations set forth contours of state duties). Title IV-D prescribes in extensive detail the precise components of plan requirements, how services must operate, timeframes for performance, the required content of state laws and administrative procedures, and a specific hierarchy for payment distributions. See 42 U.S.C. 654, 657, 666, 667; 1996 Act, §§ 313(b), 351, 110 Stat. 2210, 2211-2212, 2239 (to be codified at 42 U.S.C. 653a(b), (e) and (g), 666(a)(10)). The Secretary's regulations offer even more detailed direction, setting precise time limits for many administrative actions and mapping out specific administrative responses to a variety of child support service requests and problems. 45 C.F.R. Pts. 302, 303.[24]

Unlike the statutory provision in *Suter*, then, Title IV-D demands far more of States than the mere submission of a plan that duly recites the obligatory components listed in the Act. Cf. *Suter*, 503 U.S. at 358; see also 42 U.S.C. 1320a-2 and 1320a-10 (directing application of pre-*Suter* precedent). Title IV-D specifies what state child support services and laws shall be "in effect." 42 U.S.C. 654, 657, 666, 667. Indeed, in enacting Title IV-D in 1975, Congress expressed frustration that previous legislation had entailed little more than a "perfunctory review [by the Secretary] of the State plan material submitted by the State to see that it contains the statement that there will be a child support program which complies with the law." S. Rep. No. 1356, *supra*, at 47. Congress made clear that such "paper compliance would no longer suffice." *Ibid.*[25]

Nor can petitioner fairly claim that Title IV-D requires only "substantial compliance" with its terms. As noted above (see p. 20, *supra*), "substantial compliance" governs the assessment of penalties against States, and the definition of "substantial compliance" alerts States that it does not express the full measure of their obligations under the program. 42 U.S.C. 603(h)(3) (contrasting "substantial compliance" with a State's "full compliance with the requirements of this part," and characterizing any failure to be in full compliance as "noncompliance"); see also *Bennett*, 470 U.S. at 663 ("substantial compliance" provision in education program is prospective penalty that does not limit duty to comply with statutory conditions); *Albiston*, 7 F.3d at 266 ("the 'substantial' compliance required to avoid administrative penalties * * * is independent of, and narrower than, the State's direct obligation to AFDC recipients") (citing *Wilder*, 496 U.S. at 514-515 & n.11).[26]

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[24] Petitioner cannot claim a lack of notice that she would have to comply with the Secretary's regulations. The statutory text notifies her that she will be bound by regulations (*e.g.*, 42 U.S.C. 652(f), (h) and (i), 654(3), (9) and (14)), and the State's plan must "provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating noncustodial parents, establishing paternity, obtaining support orders, and collecting support payments." 42 U.S.C. 654(13) (as amended by 1996 Act, § 395(d)(1)(D), 110 Stat. 2259). Even without such provisions, the statutory text is not the sole source of binding obligations enforceable under Section 1983. *Suter*, 503 U.S. at 359; *Wilder*, 496 U.S. at 519; *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987); cf. *Dennis* v. *Higgins*, 498 U.S. 439, 447 n.7 (1991); *Golden State*, 493 U.S. at 112 (enforceable right implicit in statutory language).

[25] Title IV-D leaves no doubt that compliance with the Act's specific mandates is a condition of receiving federal funds. 42 U.S.C. 603(h) (federal funds reduced if program fails to comply substantially), 652(a)(4) and (g) (conditions for Title IV-A and Title IV-D funds), 655(a)(1); 45 C.F.R. Pt. 301 (same); cf. *Pennhurst*, 451 U.S. at 24-25 (no right where States were unaware that substantive conduct was a condition of federal funding).

[26] See also 59 Fed. Reg. 66,212 (1994) ("States are required to meet all Federal requirements contained in program regulations,

In short, Judge Kleinfeld's assertion in dissent below that Title IV-D requires only that States "do a pretty good job" (Pet. App. 37a) is irreconcilable with Congress's provision of major federal funding conditioned on compliance with ever-increasing and detailed statutory directives. Congress's enduring commitment to "the country's most neglected children" (*Child Support and the Work Bonus: Hearing on S. 1842 & S. 2081 Before the Senate Comm. on Finance*, 93d Cong., 1st Sess. 59 (Sept. 25, 1973)) demands more than such casual attention to the task.

c. Petitioner does not dispute the mandatory nature of Title IV-D's language. Nor does she claim ignorance of the character and caliber of child support services that Title IV-D requires. What petitioner claims instead (Br. 7, 15-16) is that she did not know that those requirements would be enforceable under Section 1983. This Court, however, has required only that the statutory "provision in question" create binding obligations, *Golden State*, 493 U.S. at 106, and that Congress "express clearly its intent to impose conditions on the grant of federal funds," *Pennhurst*, 451 U.S. at 24. This Court has never required Congress, in addition, to notify state officials in advance that a Section 1983 action will be available. *Bell*, 461 U.S. at 790 n.17 (*Pennhurst* concerned "imposing an unexpected condition for compliance," not "the remedies available against a noncomplying State"). None of the statutes at issue in *Wilder*, *Golden State*, *Thiboutot*, or other cases in which this Court found an action under Section 1983 available, contained such language.

In any event, Section 1983's text and this Court's cases construing it independently provide sufficient notice. States, therefore, are fairly charged with the knowledge that Section 1983 "must be broadly construed," *Golden*

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whether or not the requirements are included under [the regulatory definition of 'substantial compliance']."); 50 Fed. Reg. 19,623 (1985); 49 Fed. Reg. 36,773 (1984) ("substantial compliance" should not be "construed to imply that it would be permissible for States to neglect or exclude certain cases or classes of cases").

State, 493 U.S. at 105, and that a cause of action under Section 1983 "remains a generally and presumptively available remedy for claimed violations of federal law," *Livadas*, 114 S. Ct. at 2083. No serious federalism or comity benefit would be gained by requiring Congress to furnish still further and particularized advance notice to state officials that admittedly clear conditions on federal funding may be enforced under Section 1983, especially since such suits would result only in injunctive or declaratory relief requiring state officials to comply with those conditions in the future.

Nor would petitioner's proposal aid in identifying the "rights" secured by federal law; a provision in Title IV-D confirming the existence of a Section 1983 action would leave open that question. Even when a federal law does create enforceable rights, however, petitioner wants to require that Congress affirmatively confirm that a Section 1983 action is available. The rule is exactly the opposite: "[W]e recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has *affirmatively withdrawn* the remedy." *Wilder*, 496 U.S. at 509 n.9 (emphasis added); see also *Livadas*, 114 S. Ct. at 2083; *Golden State*, 493 U.S. at 107 (burden on defendant to show that Congress has withdrawn Section 1983 remedy). Congress has not done so here. See pp. 27-30, *infra*.

Petitioner's proposal is also reminiscent of the failed argument that an express right of action under Section 1983 is available only if an implied right of action would be available. *Wilder*, 496 U.S. at 508 n.9. As *Wilder* recognized, Congress has already told the States, through Section 1983, that a cause of action is available to enforce rights created by federal law. Congress said it again (twice) in 1994, with particular reference to enforcement of the Social Security Act, when it enacted 42 U.S.C. 1320a-2 and 1320a-10. Nothing in principles of federalism suggests that it would be appropriate for this Court to compel a coordinate Branch to say again what it has said three times before. Congress, after all, can always

"affirmatively withdraw[] the remedy." *Wilder*, 496 U.S. at 509 n.9.

3. *Some, But Not All, Of Title IV-D's Child Support Enforcement Provisions Are Judicially Enforceable*

A statutory right will not be found if its enforcement "would strain judicial competence." *Livadas*, 114 S. Ct. at 2083. Many of the requirements that Title IV-D imposes on state child support services are straightforward administrative and ministerial tasks of a sort that courts can and do routinely enforce. For example, the requirement that a State pay the support it collects to non-Title IV-A families, 42 U.S.C. 657, is a specific, direct, and nondiscretionary duty that courts are fully capable of enforcing.[27] Likewise, due to developments in state law and the automation of government records, the requirement that States implement income withholding to enforce child support orders is mechanical and virtually ministerial, at least in cases (like respondents') in which the father and his source of income have already been located and the support order established. 42 U.S.C. 666(a)(1) and (b); 45 C.F.R. 303.100.

By contrast, Congress has expressly preserved the States' discretion with respect to other aspects of child support enforcement. For example, although Title IV-D requires States to have laws that permit the imposition of liens, state tax refund intercepts, bond requirements, and references to consumer credit reporting agencies to collect overdue support (42 U.S.C. 666(a)(3), (4), (6) and (7)), States retain discretion to decide in individual cases whether use of those procedures will "carry out the purposes of this part or would be otherwise inappropriate in the circumstances" (42 U.S.C. 666(a)). Because the propriety of such measures "will obviously vary with the circumstances of each individual case," and because Congress left those enforcement decisions to the States, re-

[27] The former requirement that States pay the first $50 of child support collected each month to an AFDC family fell in the same category. 42 U.S.C. 602(a)(8)(A)(vi), 657(b)(1), repealed 1996 Act, § 302(a), 110 Stat. 2200 (to be codified at 42 U.S.C. 657(a)(2)).

spondents would not have a right under Section 1983 to force a child support agency to take one of those measures. *Suter*, 503 U.S. at 360. Similarly, Title IV-D leaves to the State the discretion to "determin[e] when it would be appropriate to take an enforcement action in the future" (45 C.F.R. 303.6(c)(4)), preserving the State's traditional prosecutorial discretion in deciding which cases to bring to court. Decisions of that sort are not readily susceptible to judicial review or enforcement. See *Heckler* v. *Chaney*, 470 U.S. 821, 831-835 (1985); but cf. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

In short, whether Title IV-D creates a judicially enforceable right depends upon the nature of the provision a plaintiff seeks to enforce. Because the court of appeals did not order particular relief, it is unnecessary for this Court to parse Title IV-D and its implementing regulations to determine which provisions create rights and which do not, and what remedy would be appropriate for a violation.[28] This Court may leave it to the district court on remand to determine which claims are susceptible to judicial enforcement, based on the facts alleged, an evaluation of the applicable statutory and regulatory provisions, and traditional notions of prosecutorial discretion.

D. Congress Has Not Foreclosed Actions Under Section 1983

Even if a federal law creates private rights, judicial enforcement is not available under Section 1983 if Congress has specifically foreclosed that avenue of relief. *Golden State*, 493 U.S. at 106; see also *Robinson*, 468 U.S. at 1009-1013; *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-20 (1981). This Court, however, "do[es] not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wilder*, 496 U.S. at 520 (quoting *Wright* v. *City of*

[28] At least some of respondents' claims involve enforceable rights. See, *e.g.*, Complaint ¶¶ 9-23, 29-39, 42-51, 56-61 (J.A. 7-9, 10-11, 12-15) (wage withholding, parent locator searches, commencing interstate collections, administrative paternity establishment).

Roanoke Redevelopment & Housing Auth., 479 U.S. 418, 423-424 (1987)). Here, nothing in Title IV-D's text or legislative history suggests that Congress withdrew a Section 1983 remedy, cf. *Robinson*, 468 U.S. at 1009 (statutory text and legislative history directed that claims be adjudicated through special statutory scheme),[29] and individual beneficiaries have no alternative means of vindicating their own Title IV-D rights. Cf. *ibid.*; *Sea Clammers*, 453 U.S. at 13-18.[30]

The Secretary's triennial audit powers do not displace a private cause of action under Section 1983. As petitioner repeatedly notes, the Secretary audits for "substantial compliance" on a programmatic basis, rather than to vindicate the rights of individual applicants for services. The nature of the Secretary's task, combined with its infrequency, precludes characterizing it as sufficiently "comprehensive" to foreclose a Section 1983 action. *Wilder*, 496 U.S. at 521-522; *Wright*, 479 U.S. at 428

[29] The courts have divided on whether the Secretary's enforcement powers preclude a Section 1983 action. See *Howe*, 8 F.3d at 1263 (not foreclosed); *Albiston*, 7 F.3d at 268-269 (same); *King*, 829 F. Supp. at 995 (same); *Behunin*, 744 F. Supp. at 257-258 (same); *Davis*, 909 S.W.2d at 417-419 (same); see also *Wehunt*, 875 F.2d at 1575-1577 (Clark, J., dissenting) (same); *Carelli*, 923 F.2d at 1212-1216 (foreclosed on particular facts); *Oliphant*, 1992 WL 153637, at *9-*10 (foreclosed).

[30] While beneficiaries could still enforce their support rights against the absent parent under state law, that would do nothing to vindicate their federal rights under Title IV-D to receive child support services from the State (just as a plaintiff's ability to purchase educational or medical services in the marketplace does not constitute an adequate substitute for a right to educational or medical services from the State). Furthermore, the state IV-D agency has access to enforcement tools and sources of information that a beneficiary or private attorney would not. Arizona law does allow suits, under some circumstances, to compel agency action, Ariz. Rev. Stat. Ann. §§ 12-820 to 12-826 (1992 & Supp. 1994), but not for the "exercise of an administrative function involving the determination of fundamental governmental policy," *id.* § 12-820.01 (A)(2) (1992). In any event, the availability of a parallel state court action does not preclude an action under Section 1983. Cf. *Patsy* v. *Board of Regents*, 457 U.S. 496, 506-507 (1982).

("generalized powers" "to audit, enforce annual contributions contracts, and cut off federal funds" are "insufficient to indicate a congressional intention to foreclose § 1983 remedies"). In the Secretary's judgment, under the principles and limitations set forth above, private enforcement of those provisions of Title IV-D that create enforceable rights would furnish an important complement to the Secretary's necessarily macroscopic oversight of the States, by ensuring that the States carry out the specific duties to children and custodial parents that they have voluntarily assumed under Title IV-D, while at the same time affording protection for the States in those areas Congress has left to their discretion.[31] *Albiston*, 7 F.3d at 269 (audit "protect[s] important *federal* interests * * * [in] *overall* performance," while Section 1983 "safeguards the *individual AFDC recipient's interests* in the timely receipt of the mandated federal benefits").[32]

[31] This is not to suggest that States are generally lax in their enforcement of child support obligations. Under Title IV-D, States have become more aggressive and successful in establishing orders and collecting support. See generally HHS, *Child Support Enforcement: FY 1995 Preliminary Data Report* 13-36 (May 1996).

[32] Concerns voiced by petitioner and her amici that allowing actions under Section 1983 will open the litigation floodgates and divert valuable resources are misplaced. The majority of courts that have addressed the issue have already approved Section 1983 actions (see n.18, *supra*), without any of those dire predictions coming to pass. By way of comparison, no such avalanche followed this Court's decision in *Edelman*, which held that individuals can sue under Section 1983 to force States to comply with federal time limits in administering the former Aid to the Aged, Blind and Disabled program. Indeed, some of the most successful and efficient Title IV-D programs are in States where Section 1983 actions have been permitted. *Nineteenth Annual Report* 10-11. Principles of standing and ripeness may prevent claims concerning inconsequential deviations from technical statutory and regulatory requirements that resulted in no real injury to persons seeking services. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In addition, courts will always retain their traditional equitable discretion to withhold

Common sense also dictates that the Secretary's supervisory audit powers do not foreclose private enforcement. Congress has spent the last 20 years legislating in ever-increasing detail the standards for state child support services, and it has given the States billions of dollars of the taxpayers' money expressly conditioned on their compliance with those standards. Given the amount of money allocated and the breadth and depth of regulation, there is no basis for believing that Congress, in seeking to protect the "millions of women and children who are victimized by the nonpayment of child support" (129 Cong. Rec. 33,037 (1983) (Rep. Biaggi)), intended to rely entirely on a federal audit that occurs only once every three years and that (at least by petitioner's characterization) disregards whether fully one-fourth of Title IV-D's targeted beneficiaries is entirely neglected by the system.

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relief when the departure from federal law is inconsequential or the state default has been corrected. See *Withrow*, 942 F.2d at 1388; *Haskins* v. *Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986). And limitations on class actions under Fed. R. Civ. P. 23 must, of course, be enforced. See also Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321-53 (barring use of funds furnished by Legal Services Corporation to support class actions). Should litigation nevertheless prove burdensome, Congress can readily respond by imposing an exhaustion requirement or otherwise limiting the availability of Section 1983 in this context. Cf. 42 U.S.C. 1997e (imposing exhaustion requirement on prisoner suits). Finally, if the specific requirements and timetables that Congress has enacted and strengthened under Title IV-D prove unworkable in practice, that is a problem for Congress to fix by amending Title IV-D itself.

CONCLUSION

The judgment of the court of appeals should be affirmed, with provision for remand to the district court for further proceedings with respect to respondents' particular claims.

Respectfully submitted.

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APPENDIX

Title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, provides [1]:

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 7—SOCIAL SECURITY

SUBCHAPTER IV—GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES

Part D—Child Support and Establishment of Paternity

Sec. 651. Authorization of appropriations

For the purpose of enforcing the support obligations owed by *absent* **noncustodial** parents to their children and the spouse (or former spouse) with whom such children are living, locating *absent* **noncustodial** parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for *aid* **assistance under a State program funded** under part A of this subchapter) for whom such assistance is requested, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

Sec. 652. Duties of Secretary

(a) Establishment of separate organizational unit; duties

The Secretary shall establish, within the Department of Health and Human Services a separate organizational unit,

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[1] Statutory language added by the 1996 Act appears in bold print. Statutory language deleted by the 1996 Act is italicized.

under the direction of a designee of the Secretary, who shall report directly to the Secretary and who shall—

(1) establish such standards for State programs for locating *absent* **noncustodial** parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the *absent* **noncustodial** parent's child is living as he determines to be necessary to assure that such programs will be effective;

(2) establish minimum organizational and staffing requirements for State units engaged in carrying out such programs under plans approved under this part;

(3) review and approve State plans for such programs;

(4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part as may be necessary to assure their conformity with the requirements of this part, and, not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 603(h)(1) of this title, or which is operating under a corrective action plan in accordance with section 603(h)(2) of this title), conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 603(h) of this title whether the actual operation of such programs in each State conforms to the requirements of this part;

(4)(A) review data and calculations transmitted by State agencies pursuant to section 654(15)(B) on State program accomplishments with respect to performance indicators for purposes of subsection (g) of this section and section 658;

(B) review annual reports submitted pursuant to section 654(15)(A) and, as appropriate, pro-

vide to the State comments, recommendations for additional or alternative corrective actions, and technical assistance; and

(C) conduct audits, in accordance with the Government auditing standards of the Comptroller General of the United States—

(i) at least once every 3 years (or more frequently, in the case of a State which fails to meet the requirements of this part concerning performance standards and reliability of program data) to assess the completeness, reliability, and security of the data and the accuracy of the reporting systems used in calculating performance indicators under subsection (g) of this section and section 658;

(ii) of the adequacy of financial management of the State program operated under the State plan approved under this part, including assessments of—

(I) whether Federal and other funds made available to carry out the State program are being appropriately expended, and are properly and fully accounted for; and

(II) whether collections and disbursements of support payments are carried out correctly and are fully accounted for; and

(iii) for such other purposes as the Secretary may find necessary;

(5) assist States in establishing adequate reporting procedures and maintain records of the operations of programs established pursuant to this part in each State, **and establish procedures to be followed by States for collecting and reporting information re-**

quired to be provided under this part, and establish uniform definitions (including those necessary to enable the measurement of State compliance with the requirements of this part relating to expedited processes) to be applied in following such procedures;

(6) maintain records of all amounts collected and disbursed under programs established pursuant to the provisions of this part and of the costs incurred in collecting such amounts;

(7) provide technical assistance to the States to help them establish effective systems for collecting child and spousal support and establishing paternity, **and specify the minimum requirements of an affidavit to be used for the voluntary acknowledgment of paternity which shall include the social security number of each parent and, after consultation with the States, other common elements as determined by such designee;**

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against *absent* **noncustodial** parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating State against the *absent* **noncustodial** parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications;

(9) operate the **Federal** Parent Locator Service established by section 653 of this title; *and*

(10) not later than three months after the end of each fiscal year, beginning with the year 1977, submit to the Congress a full and complete report on all activities undertaken pursuant to the provisions of this part, which report shall include, but not be limited to, the following:

(A) total program costs and collections set forth in sufficient detail to show the cost to the

States and the Federal Government, the distribution of collections to families, State and local governmental units, and the Federal Government; and an identification of the financial impact of the provisions of *this part;* **this part, including—**

(i) the total amount of child support payments collected as a result of services furnished during the fiscal year to individuals receiving services under this part;

(ii) the cost to the States and to the Federal Government of so furnishing the services; and

(iii) the number of cases involving families—

(I) who became ineligible for assistance under State programs funded under part A during a month in the fiscal year; and

(II) with respect to whom a child support payment was received in the month;

(B) costs and staff associated with the Office of Child Support Enforcement;

(C) the following data, *with the data required under each clause being separately stated for cases* **separately stated for cases** where the child is receiving *aid to families with dependent children* **assistance under a State program funded under part A** (or foster care maintenance payments under part E of this subchapter), *cases where the child was formerly receiving* **or formerly received** *such aid* **such assistance** or payments and the State is continuing to collect support assigned to it *under section 602(a)(26) or* **pursuant to section 608 (a)(3) or under section** 671(a)(17) **or 1912**

of this title, and **for** all other cases under this part:

(i) the total number of cases in which a support obligation has been established in the fiscal year for which the report is submitted, *and the total amount of such obligations*;

(ii) the total number of cases in which a support obligation has been established, *and the total amount of such obligations*;

(iii) the number of cases *described in clause (i) in which support was collected during such fiscal year, and the total amount of such collections;* **in which support was collected during the fiscal year;**

(iv) the number of cases described in clause (ii) in which support was collected during such fiscal year, and the total amount of such collections; and

(iv) the total amount of support collected during such fiscal year and distributed as current support;

(v) the total amount of support collected during such fiscal year and distributed as arrearages;

(vi) the total amount of support due and unpaid for all fiscal years; and

(v) **(vii)** the number of child support cases filed in each State in such fiscal year, and the amount of the collections made in each State in such fiscal year, on behalf of children residing in another State or against parents residing in another State;

(D) the status of all State plans under this part as of the end of the fiscal year last ending before the report is submitted, together with an explanation of any problems which are delaying or preventing approval of State plans under this part;

(E) data, by State, on the use of the Federal Parent Locator Service, and the number of locate requests submitted without the *absent* **noncustodial** parent's social security account number;

(F) the number of cases, by State, in which an applicant for or recipient of *aid under a State plan approved* **assistance under a State program funded** under part A of this subchapter has refused to cooperate in identifying and locating the *absent* **noncustodial** parent and the number of cases in which refusal so to cooperate is based on good cause (as determined *in accordance with the standards referred to in section 602(a)(26)(B)(ii) of this title* **by the State**);

(G) data, by State, *on the use of Federal courts and* on use of the Internal Revenue Service for collections, the number of court orders on which collections were made, the number of paternity determinations made and the number of parents located, in sufficient detail to show the cost and benefits to the States and to the Federal Government;

(H) the major problems encountered which have delayed or prevented implementation of the provisions of this part during the fiscal year last ending prior to the submission of such report; *and*

(I) the amount of administrative costs which are expended in each functional category of expenditures, including establishment of paternity; **and**

(J) compliance, by State, with the standards established pursuant to subsections (h) and (i).

The information contained in any such report under subparagraph (A) shall specifically include (i) the total amount of child support payments collected as a result of services furnished during the fiscal year involved to individuals under section 654(6) of this title, (ii) the cost to the States and to the Federal Government of furnishing such services to those individuals, and (iii) the extent to which the furnishing of such services was successful in providing sufficient support to those individuals to assure that they did not require assistance under the State plan approved under part A of this subchapter.; **and**

(11) not later than October 1, 1996, after consulting with the State directors of programs under this part, promulgate forms to be used by States in interstate cases for—

(A) collection of child support through income withholding;

(B) imposition of liens; and

(C) administrative subpoenas.

(b) Certification of child support obligations to Secretary of the Treasury for collection

The Secretary shall, upon the request of any State having in effect a State plan approved under this part, certify to the Secretary of the Treasury for collection pursuant to the provisions of section 6305 of the Internal Revenue Code of 1986 the amount of any child support obligation (including any support obligation with respect to the parent who is living with the child and receiving *aid under the State plan approved under part A* **assistance under the State program funded under part A** of this subchapter) which is assigned to such State or is undertaken to be collected by such State pursuant to section *654(6)* **654(4)** of this title. No amount may be certified for collection under this subsection except the amount of the delinquency under a court or administrative order for

support and upon a showing by the State that such State has made diligent and reasonable efforts to collect such amounts utilizing its own collection mechanisms, and upon an agreement that the State will reimburse the Secretary of the Treasury for any costs involved in making the collection. All reimbursements shall be credited to the appropriation accounts which bore all or part of the costs involved in making the collections. The Secretary after consultation with the Secretary of the Treasury may, by regulation, establish criteria for accepting amounts for collection and for making certification under this subsection including imposing such limitations on the frequency of making such certifications under this subsection.

(c) Payment of child support collections to States

The Secretary of the Treasury shall from time to time pay to each State for distribution in accordance with the provisions of section 657 of this title the amount of each collection made on behalf of such State pursuant to subsection (b) of this section.

(d) Child support management information system

(1) Except as provided in paragraph (3), the Secretary shall not approve the initial and annually updated advance automated data processing planning document, referred to in section 654(16) of this title, unless he finds that such document, when implemented, will generally carry out the objectives of the management system referred to in such subsection, and such document—

(A) provides for the conduct of, and reflects the results of, requirements analysis studies, which include consideration of the program mission, functions, organization, services, constraints, and current support, of, in, or relating to, such system.

(B) contains a description of the proposed management system referred to in section 655

(a)(1)(B) of this title, including a description of information flows, input data, and output reports and uses,

(C) sets forth the security and interface requirements to be employed in such management system,

(D) describes the projected resource requirements for staff and other needs, and the resources available or expected to be available to meet such requirements,

(E) contains an implementation plan and backup procedures to handle possible failures,

(F) contains a summary of proposed improvement of such management system in terms of qualitative and quantitative benefits, and

(G) provides such other information as the Secretary determines under regulation is necessary.

(2)(A) The Secretary shall through the separate organizational unit established pursuant to subsection (a) of this section, on a continuing basis, review, assess, and inspect the planning, design, and operation of, management information systems referred to in section 655(a)(1)(B) of this title, with a view to determining whether, and to what extent, such systems meet and continue to meet requirements imposed under paragraph (1) and the conditions specified under section 654(16) of this title.

(B) If the Secretary finds with respect to any statewide management information system referred to in section 655(a)(1)(B) of this title that there is a failure substantially to comply with criteria, requirements, and other undertakings, prescribed by the advance automated data processing planning document theretofore approved by the Secretary with respect to such

system, then the Secretary shall suspend his approval of such document until there is no longer any such failure of such system to comply with such criteria, requirements, and other undertakings so prescribed.

(3) The Secretary may waive any requirement of paragraph (1) or any condition specified under section 654(16) of this title with respect to a State if—

(A) the State demonstrates to the satisfaction of the Secretary that the State has an alternative system or systems that enable the State, for purposes of section 603(h) of this title, to be in substantial compliance with other requirements of this part; and

(B) (i) the waiver meets the criteria of paragraphs (1), (2), and (3) of section *1315(c)* **1315(b)** of this title, or

(ii) the State provides assurances to the Secretary that steps will be taken to otherwise improve the State's child support enforcement program.

(e) Technical assistance to States

The Secretary shall provide such technical assistance to States as he determines necessary to assist States to plan, design, develop, or install and provide for the security of, the management information systems referred to in section 655(a)(1)(B) of this title.

(f) Regulations

The Secretary shall issue regulations to require that State agencies administering the child support enforcement program under this part petition for the inclusion of medical support as part of any child support order whenever health care coverage is available to the *absent*

noncustodial parent at a reasonable cost. Such regulation shall also provide for improved information exchange between such State agencies and the State agencies administering the State medicaid programs under subchapter XIX of this chapter with respect to the availability of health insurance coverage.

(g) Performance standards for State paternity establishment programs

(1) A State's program under this part shall be found, for purposes of section 603(h) of this title, not to have complied substantially with the requirements of this part unless, for any fiscal year beginning on or after October 1, 1994, its paternity establishment percentage for such fiscal year is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds—

(A) *75* **90** percent;

(B) for a State with a paternity establishment percentage of not less than 75 percent but less than 90 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 2 percentage points;

*(B)***(C)** for a State with a paternity establishment percentage of not less than 50 percent but less than 75 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 3 percentage points;

*(C)***(D)** for a State with a paternity establishment percentage of not less than 45 percent but less than 50 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 4 percentage points;

*(D)***(E)** for a State with a paternity establishment percentage of not less than 40 percent but less than 45 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 5 percentage points; or

*(E)***(F)** for a State with a paternity establishment percentage of less than 40 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 6 percentage points.

In determining compliance under this section, a State may use as its paternity establishment percentage either the State's IV-D paternity establishment percentage (as defined in paragraph (2)(A)) or the State's statewide paternity establishment percentage (as defined in paragraph (2)(B)).

(2) For purposes of this section—

(A) the term *"paternity establishment percentage* **IV-D paternity establishment percentage**" means, with respect to a State *(or all States, as the case may be)* for a fiscal year, the ratio (expressed as a percentage) that the total number of children—

(i) who have been born out of wedlock,

(ii)(I) except as provided in the last sentence of this paragraph, with respect to whom *aid is being paid under the State's plan approved under part A or E* **assistance was being provided under the State program funded under part A** of this subchapter in the fiscal year, at the option of the State, as of the end of such year, or (II) with respect to whom services are being provided under the State's plan approved under this part in the fiscal year or,

at the option of the State, as of the end of such year pursuant to an application submitted under section *654(6)* **654(4)(A)(ii)** of this title, and

(iii) the paternity of whom has been established or acknowledged, bears to the total number of children born out of wedlock and (except as provided in such last sentence) with respect to whom *aid was being paid under the State's plan approved under part A or E* **assistance was being provided under the State program funded under part A** of this subchapter as of the end of the preceding fiscal year or with respect to whom services were being provided under the State's plan approved under this part as of the end of the preceding fiscal year pursuant to an application submitted under section *654(6)* **654(4)(A)(ii)** of this title; *and*

(B) the term 'statewide paternity establishment percentage' means, with respect to a State for a fiscal year, the ratio (expressed as a percentage) that the total number of minor children—

(i) who have been born out of wedlock, and

(ii) the paternity of whom has been established or acknowledged during the fiscal year, bears to the total number of children born out of wedlock during the preceding fiscal year; and

*(B)***(C)** the term "reliable data" means the most recent data available which are found by the Secretary to be reliable for purposes of this section.

For purposes of subparagraph (A), the total number of children shall not include any child *who is a dependent child* **with respect to whom assistance is being provided under the State program funded under part A** by reason of the death of a parent unless paternity is established for such child or any child with respect to whom an applicant or recipient is found **by the State** *to have good cause for refusing to cooperate under section 602(a)(26)* **to qualify for a good cause or other exception to cooperation pursuant to section 654(29)** of this title or any child with respect to whom the State agency administering the plan under part E of this subchapter determines (as provided in section 654(4)(B) of this title) that it is against the best interests of such child to do so.

(3)*(A) The requirements of this subsection are in addition to and shall not supplant any other requirement (that is not inconsistent with such requirements) established in regulations by the Secretary for the purpose of determining (for purposes of section 603(h) of this title) whether the program of a State operated under this part shall be treated as complying substantially with the requirements of this part.*

*(B)***(A)** The Secretary may modify the requirements of this subsection to take into account such additional variables as the Secretary identifies (including *the percentage of children born out of wedlock in a State* **the percentage of children in a State who are born out of wedlock or for whom support has not been established**) that affect the ability of a State to meet the requirements of this subsection.

*(C)***(B)** The Secretary shall submit an annual report to the Congress that sets forth the data upon which the paternity establishment percentages for States for a fiscal year are based,

lists any additional variables the Secretary has identified under subparagraph (A), and describes State performance in establishing paternity.

(h) Prompt State response to requests for child support assistance

The standards required by subsection (a)(1) of this section shall include standards establishing time limits governing the period or periods within which a State must accept and respond to requests (from States, jurisdictions thereof, or individuals who apply for services furnished by the State agency under this part or with respect to whom an assignment *under section 602(a)(26)* **pursuant to section 608(a)(3)** of this title is in effect) for assistance in establishing and enforcing support orders, including requests to locate *absent* **noncustodial** parents, establish paternity, and initiate proceedings to establish and collect child support awards.

(i) Prompt State distribution of amounts collected as child support

The standards required by subsection (a)(1) of this section shall include standards establishing time limits governing the period or periods within which a State must distribute, in accordance with section 657 of this title, amounts collected as child support pursuant to the State's plan approved under this part.

(j) Out of any money in the Treasury of the United States not otherwise appropriated, there is hereby appropriated, to the Secretary for each fiscal year an amount equal to 1 percent of the total amount paid to the Federal Government pursuant to section 657(a) during the immediately preceding fiscal year (as determined on the basis of the most recent reliable data available to the Secretary as of the end of the third calendar quarter following

the end of such preceding fiscal year, to cover costs incurred by the Secretary for—

(1) information dissemination and technical assistance to States, training of State and Federal staff, staffing studies, and related activities needed to improve programs under this part (including technical assistance concerning State automated systems required by this part); and

(2) research, demonstration, and special projects of regional or national significance relating to the operation of State programs under this part.

The amount appropriated under this subsection shall remain available until expended.

(k)(1) If the Secretary receives a certification by a State agency in accordance with the requirements of section 654(31) that an individual owes arrearages of child support in an amount exceeding $5,000, the Secretary shall transmit such certification to the Secretary of State for action (with respect to denial, revocation, or limitation of passports) pursuant to paragraph (2).

(2) The Secretary of State shall, upon certification by the Secretary transmitted under paragraph (1), refuse to issue a passport to such individual, and may revoke, restrict, or limit a passport issued previously to such individual.

(3) The Secretary and the Secretary of State shall not be liable to an individual for any action with respect to a certification by a State agency under this section.

Sec. 653. **Federal** Parent Locator Service

(a) Establishment; purpose

The Secretary shall establish and conduct a **Federal** Parent Locator Service, under the direction of the designee of the Secretary referred to in section 652(a) of

this title, which shall be used to obtain and transmit to any authorized person (as defined in subsection (c)) *of this section information as to the whereabouts of any absent parent when such information is to be used to locate such parent for the purpose of enforcing support obligations against such parent,* **for the purpose of establishing parentage, establishing, setting the amount of, modifying, or enforcing child support obligations, or enforcing child custody or visitation orders—**

(1) information on, or facilitating the discovery of, the location of any individual—

(A) who is under an obligation to pay child support or provide child custody or visitation rights;

(B) against whom such an obligation is sought;

(C) to whom such an obligation is owed,

including the individual's social security number (or numbers), most recent address, and the name, address, and employer identification number of the individual's employer;

(2) information on the individual's wages (or other income) from, and benefits of, employment (including rights to or enrollment in group health care coverage); and

(3) information on the type, status, location, and amount of any assets of, or debts owed by or to, any such individual.

(b) Disclosure of information to authorized persons

Upon request, filed in accordance with subsection (d) of this section of any authorized person (as defined in subsection (c) of this section) for the *social security account number (or numbers, if the individual involved has more than one such number) and the most recent address*

and place of employment of any absent parent **information described in subsection (a)**, the Secretary shall, notwithstanding any other provision of law, provide through the **Federal** Parent Locator Service such information to such person, if such information—

(1) is contained in any files or records maintained by the Secretary or by the Department of Health and Human Services; or

(2) is not contained in such files or records, but can be obtained by the Secretary, under the authority conferred by subsection (e) of this section, from any other department, agency, or instrumentality of the United States or of any State.

No information shall be disclosed to any person if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. The Secretary shall give priority to requests made by any authorized person described in subsection (c)(1) of this section. **No information shall be disclosed to any person if the State has notified the Secretary that the State has reasonable evidence of domestic violence or child abuse and the disclosure of such information could be harmful to the custodial parent or the child of such parent. Information received or transmitted pursuant to this section shall be subject to the safeguard provisions contained in section 654(26).**

(c) "Authorized person" defined

As used in subsection (a) of this section, the term "authorized person" means—

(1) any agent or attorney of any State having in effect a plan approved under this part, who has the duty or authority under such plans to seek to recover any amounts owed as child and spousal *support* **sup-**

port or to seek to enforce orders providing child custody or visitation rights (including, when authorized under the State plan, any official of a political subdivision);

(2) the court which has authority to issue an order against *an absent* **a noncustodial** parent for the support and maintenance of a child, *or any agent of such court, and* **or to issue an order against a resident parent for child custody or visitation rights, or any agent of such court;**

(3) the resident parent, legal guardian, attorney, or agent of a child (other than a child receiving *aid under part A of this subchapter* **assistance under a State program funded under part A**) (as determined by regulations prescribed by the Secretary) without regard to the existence of a court order against *an absent* **a noncustodial** parent who has a duty to support and maintain any such child.

(d) Form and manner of request for information

A request for information under this section shall be filed in such manner and form as the Secretary shall by regulation prescribe and shall be accompanied or supported by such documents as the Secretary may determine to be necessary.

(e) Compliance with request; search of files and records by head of any department, etc., of United States; transmittal of information to Secretary; reimbursement for cost of search; fees

(1) Whenever the Secretary receives a request submitted under subsection (b) of this section which he is reasonably satisfied meets the criteria established by subsections (a), (b), and (c) of this section, he shall promptly undertake to provide the information requested from the files and records maintained

by any of the departments, agencies, or instrumentalities of the United States or of any State.

(2) Notwithstanding any other provision of law, whenever the individual who is the head of any department, agency, or instrumentality of the United States receives a request from the Secretary for information authorized to be provided by the Secretary under this section, such individual shall promptly cause a search to be made of the files and records maintained by such department, agency, or instrumentality with a view to determining whether the information requested is contained in any such files or records. If such search discloses the information requested, such individual shall immediately transmit such information to the Secretary, except that if any information is obtained the disclosure of which would contravene national policy or security interests of the United States or the confidentiality of census data, such information shall not be transmitted and such individual shall immediately notify the Secretary. If such search fails to disclose the information requested, such individual shall immediately so notify the Secretary. The costs incurred by any such department, agency, or instrumentality of the United States or of any State in providing such information to the Secretary shall be reimbursed by him **in an amount which the Secretary determines to be reasonable payment for the information exchange (which amount shall not include payment for the costs of obtaining, compiling, or maintaining the information)**. Whenever such services are furnished to an individual specified in subsection (c)(3) of this section, a fee shall be charged such individual. The fee so charged shall be used to reimburse the Secretary or his delegate for the expense of providing such services.

(3) The Secretary of Labor shall enter into an agreement with the Secretary to provide prompt ac-

cess for the Secretary (in accordance with this subsection) to the wage and unemployment compensation claims information and data maintained by or for the Department of Labor or State employment security agencies.

(f) Arrangements and cooperation with State agencies

The Secretary, in carrying out his duties and functions under this section, shall enter into arrangements with State agencies administering State plans approved under this part for such State agencies to accept from resident parents, legal guardians, or agents of a child described in subsection (c)(3) of this section and to transmit to the Secretary requests for information with regard to the whereabouts of *absent* **noncustodial** parents and otherwise to cooperate with the Secretary in carrying out the purposes of this section.

(g) Reimbursement for reports by State agencies.

The Secretary may reimburse Federal and State agencies for the costs incurred by such entities in furnishing information requested by the Secretary under this section in an amount which the Secretary determines to be reasonable payment for the information exchange (which amount shall not include payment for the costs of obtaining, compiling, or maintaining the information).

(h) Federal case registry of child support orders.

(1) In general.—Not later than October 1, 1998, in order to assist States in administering programs under State plans approved under this part and programs funded under part A, and for the other purposes specified in this section, the Secretary shall establish and maintain in the Federal Parent Locator Service an automated registry (which shall be known as the 'Federal Case Registry of Child Support Orders'), which shall contain abstracts of support orders and other information described in paragraph (2) with respect to each case in each State case registry maintained pursuant to section 654A(e), as furnished (and regularly updated), pursuant to section 654A(f), by State agencies administering programs under this part.

(2) Case information. The information referred to in paragraph (1) with respect to a case shall be such information as the Secretary may specify in regulations (including the names, social security numbers or other uniform identification numbers, and State case identification numbers) to identify the individuals who owe or are owed support (or with respect to or on behalf of whom support obligations are sought to be established), and the State or States which have the case.

(i) National directory of new hires.

(1) In general.—In order to assist States in administering programs under State plans approved under this part and programs funded under part A, and for the other purposes specified in this section, the Secretary shall, not later than October 1, 1997, establish and maintain in the Federal Parent Locator Service an automated directory to be known as the National Directory of New Hires, which shall contain the information supplied pursuant to section 653A(g)(2).

(2) Entry of data.—Information shall be entered into the data base maintained by the National Directory of New Hires within 2 business days of receipt pursuant to section 653A(g)(2).

(3) Administration of Federal tax laws.—The Secretary of the Treasury shall have access to the information in the National Directory of New Hires for purposes of administering section 32 of the Internal

Revenue Code of 1986, or the advance payment of the earned income tax credit under section 3507 of such Code, and verifying a claim with respect to employment in a tax return.

(4) List of multistate employers.—The Secretary shall maintain within the National Directory of New Hires a list of multistate employers that report information regarding newly hired employees pursuant to section 653A(b)(1)(B), and the State which each such employer has designated to receive such information.

(j) Information comparisons and other disclosures.

(1) Verification by Social Security Administration.—

(A) In general.—The Secretary shall transmit information on individuals and employers maintained under this section to the Social Security Administration to the extent necessary for verification in accordance with subparagraph (B).

(B) Verification by SSA.—The Social Security Administration shall verify the accuracy of, correct, or supply to the extent possible, and report to the Secretary, the following information supplied by the Secretary pursuant to subparagraph (A):

(i) The name, social security number, and birth date of each such individual.

(ii) The employer identification number of each such employer.

(2) Information comparison.—For the purpose of locating individuals in a paternity establishment case or a case involving the establishment, modification, or enforcement of a support order, the Secretary shall—

(A) compare information in the National Directory of New Hires against information in the support case abstracts in the Federal Case Registry of Child Support Orders not less often than every 2 business days; and

(B) within 2 business days after such a comparison reveals a match with respect to an individual, report the information to the State agency responsible for the case.

(3) Information comparisons and disclosures of information in all registries for Title IV program purposes.—To the extent and with the frequency that the Secretary determines to be effective in assisting States to carry out their responsibilities under programs operated under this part and programs funded under part A, the Secretary shall—

(A) compare the information in each component of the Federal Parent Locator Service maintained under this section against the information in each other such component (other than the comparison required by paragraph (2)), and report instances in which such a comparison reveals a match with respect to an individual to State agencies operating such programs; and

(B) disclose information in such registries to such State agencies.

(4) Provision of new hire information to the Social Security Administration.—The National Directory of New Hires shall provide the Commissioner of Social Security with all information in the National Directory.

(5) Research.—The Secretary may provide access to information reported by employers pursuant to section 653A(b) for research purposes found by the Secretary to be likely to contribute to achieving

the purposes of part A or this part, but without personal identifiers.

(k) Fees.—

(1) For SSA verification.—The Secretary shall reimburse the Commissioner of Social Security, at a rate negotiated between the Secretary and the Commissioner, for the costs incurred by the Commissioner in performing the verification services described in subsection (j).

(2) For information from State directories of new hires.—The Secretary shall reimburse costs incurred by State directories of new hires in furnishing information as required by subsection (j)(3), at rates which the Secretary determines to be reasonable (which rates shall not include payment for the costs of obtaining, compiling, or maintaining such information).

(3) For information furnished to State and Federal agencies.—A State or Federal agency that receives information from the Secretary pursuant to this section shall reimburse the Secretary for costs incurred by the Secretary in furnishing the information, at rates which the Secretary determines to be reasonable (which rates shall include payment for the costs of obtaining, verifying, maintaining, and comparing the information).

(l) Restriction on disclosure and use.—Information in the Federal Parent Locator Service, and information resulting from comparisons using such information, shall not be used or disclosed except as expressly provided in this section, subject to section 6103 of the Internal Revenue Code of 1986.

(m) Information integrity and security.—The Secretary shall establish and implement safeguards with respect to the entities established under this section designed to—

(1) ensure the accuracy and completeness of information in the Federal Parent Locator Service; and

(2) restrict access to confidential information in the Federal Parent Locator Service to authorized persons, and restrict use of such information to authorized purposes.

(n) Federal Government reporting.—Each department, agency, and instrumentality of the United States shall on a quarterly basis report to the Federal Parent Locator Service the name and social security number of each employee and the wages paid to the employee during the previous quarter, except that such a report shall not be filed with respect to an employee of a department, agency, or instrumentality performing intelligence or counterintelligence functions, if the head of such department, agency, or instrumentality has determined that filing such a report could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.

(o) Recovery of costs.—Out of any money in the Treasury of the United States not otherwise appropriated, there is hereby appropriated to the Secretary for each fiscal year an amount equal to 2 percent of the total amount paid to the Federal Government pursuant to section 657(a) during the immediately preceding fiscal year (as determined on the basis of the most recent reliable data available to the Secretary as of the end of the 3rd calendar quarter following the end of such preceding fiscal year), to cover costs incurred by the Secretary for operation of the Federal Parent Locator Service under this section, to the extent such costs are not recovered through user fees.

(p) Support order defined.—As used in this part, the term 'support order' means a judgment, decree, or or-

der, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing State, or a child and the parent with whom the child is living, which provides for monetary support, health care, arrearages, or reimbursement, and which may include related costs and fees, interest and penalties, income withholding, attorneys' fees, and other relief.

Sec. 653A. State Directory Of New Hires.

(a) Establishment.—

(1) In general.—

(A) Requirement for States that have no directory.—Except as provided in subparagraph (B), not later than October 1, 1997, each State shall establish an automated directory (to be known as the 'State Directory of New Hires') which shall contain information supplied in accordance with subsection (b) by employers on each newly hired employee.

(B) States with new hire reporting law in existence.—A State which has a new hire reporting law in existence on the date of the enactment of this section may continue to operate under the State law, but the State must meet the requirements of subsection (g)(2) not later than October 1, 1997, and the requirements of this section (other than subsection (g)(2)) not later than October 1, 1998.

(2) Definitions.—As used in this section:

(A) Employee.—The term 'employee'—

(i) means an individual who is an employee within the meaning of chapter 24

of the Internal Revenue Code of 1986; and

(ii) does not include an employee of a Federal or State agency performing intelligence or counterintelligence functions, if the head of such agency has determined that reporting pursuant to paragraph (1) with respect to the employee could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.

(B) Employer.—

(i) In general.—The term 'employer' has the meaning given such term in section 3401(d) of the Internal Revenue Code of 1986 and includes any governmental entity and any labor organization.

(ii) Labor organization.—The term 'labor organization' shall have the meaning given such term in section 2(5) of the National Labor Relations Act, and includes any entity (also known as a 'hiring hall') which is used by the organization and an employer to carry out requirements described in section 8(f)(3) of such Act of an agreement between the organization and the employer.

(b) Employer information.—

(1) Reporting requirement.—

(A) In general.—Except as provided in subparagraphs (B) and (C), each employer shall furnish to the Directory of New Hires of the State in which a newly hired employee works, a report that contains the name, address, and

social security number of the employee, and the name and address of, and identifying number assigned under section 6109 of the Internal Revenue Code of 1986 to, the employer.

(B) Multistate employers.—An employer that has employees who are employed in 2 or more States and that transmits reports magnetically or electronically may comply with subparagraph (A) by designating 1 State in which such employer has employees to which the employer will transmit the report described in subparagraph (A), and transmitting such report to such State. Any employer that transmits reports pursuant to this subparagraph shall notify the Secretary in writing as to which State such employer designates for the purpose of sending reports.

(C) Federal Government employers.—Any department, agency, or instrumentality of the United States shall comply with subparagraph (A) by transmitting the report described in subparagraph (A) to the National Directory of New Hires established pursuant to section 653.

(2) Timing of report.—Each State may provide the time within which the report required by paragraph (1) shall be made with respect to an employee, but such report shall be made—

(A) not later than 20 days after the date the employer hires the employee; or

(B) in the case of an employer transmitting reports magnetically or electronically, by 2 monthly transmissions (if necessary) not less than 12 days nor more than 16 days apart.

(c) Reporting format and method.—Each report required by subsection (b) shall be made on a W-4 form or, at the option of the employer, an equivalent form, and may be

transmitted by 1st class mail, magnetically, or electronically.

(d) Civil money penalties on noncomplying employers.—The State shall have the option to set a State civil money penalty which shall be less than—

(1) $25; or

(2) $500 if, under State law, the failure is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report.

(e) Entry of employer information.—Information shall be entered into the data base maintained by the State Directory of New Hires within 5 business days of receipt from an employer pursuant to subsection (b).

(f) Information comparisons.—

(1) In general.—Not later than May 1, 1998, an agency designated by the State shall, directly or by contract, conduct automated comparisons of the social security numbers reported by employers pursuant to subsection (b) and the social security numbers appearing in the records of the State case registry for cases being enforced under the State plan.

(2) Notice of match.—When an information comparison conducted under paragraph (1) reveals a match with respect to the social security number of an individual required to provide support under a support order, the State Directory of New Hires shall provide the agency administering the State plan approved under this part of the appropriate State with the name, address, and social security number of the employee to whom the social security number is assigned, and the name and address of, and identifying number assigned under section 6109 of the Internal Revenue Code of 1986 to, the employer.

(g) Transmission of information.—

(1) Transmission of wage withholding notices to employers.—Within 2 business days after the date information regarding a newly hired employee is entered into the State Directory of New Hires, the State agency enforcing the employee's child support obligation shall transmit a notice to the employer of the employee directing the employer to withhold from the income of the employee an amount equal to the monthly (or other periodic) child support obligation (including any past due support obligation) of the employee, unless the employee's income is not subject to withholding pursuant to section 666(b)(3).

(2) Transmissions to the National Directory of New Hires.—

(A) New hire information.—Within 3 business days after the date information regarding a newly hired employee is entered into the State Directory of New Hires, the State Directory of New Hires shall furnish the information to the National Directory of New Hires.

(B) Wage and unemployment compensation information.—The State Directory of New Hires shall, on a quarterly basis, furnish to the National Directory of New Hires extracts of the reports required under section 303(a)(6) to be made to the Secretary of Labor concerning the wages and unemployment compensation paid to individuals, by such dates, in such format, and containing such information as the Secretary of Health and Human Services shall specify in regulations.

(3) Business day defined.—As used in this subsection, the term 'business day' means a day on which State offices are open for regular business.

(h) Other uses of new hire information.—

(1) Location of child support obligors.—The agency administering the State plan approved under this part shall use information received pursuant to subsection (f)(2) to locate individuals for purposes of establishing paternity and establishing, modifying, and enforcing child support obligations, and may disclose such information to any agent of the agency that is under contract with the agency to carry out such purposes.

(2) Verification of eligibility for certain programs.—A State agency responsible for administering a program specified in section 1137(b) shall have access to information reported by employers pursuant to subsection (b) of this section for purposes of verifying eligibility for the program.

(3) Administration of employment security and workers' compensation.—State agencies operating employment security and workers' compensation programs shall have access to information reported by employers pursuant to subsection (b) for the purposes of administering such programs.

Sec. 654. State plan for child and spousal support

A State plan for child and spousal support must—

(1) provide that it shall be in effect in all political subdivisions of the State;

(2) provide for financial participation by the State;

(3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan;

(4) *provide that such State will undertake—*

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title or section 1396k of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, or, in the case of such child with respect to whom an assignment under section 1396k of this title is in effect, the State agency administering the plan approved under subchapter XIX of this chapter determines pursuant to section 1396k(a)(1)(B) of this title that it is against the best interests of the child to do so, and

(B) in the case of any child with respect to whom such assignment is effective, including an assignment with respect to a child on whose behalf a State agency is making foster care maintenance payments under part E of this subchapter, to secure support for such child from his parent (or from any other person legally liable for such support), and from such parent for his spouse (or former spouse) receiving aid to families with dependent children or medical assistance under a State plan approved under subchapter XIX of this chapter (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), utilizing any reciprocal arrangements adopted with other States (unless the agency administering the plan of the State under part A or E of this subchapter determines in accordance with the standards

prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support;

(4) provide that the State will—

(A) provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan with respect to—

(i) each child for whom (I) assistance is provided under the State program funded under part A of this title, (II) benefits or services for foster care maintenance are provided under the State program funded under part E of this title, or (III) medical assistance is provided under the State plan approved under title XIX, unless, in accordance with paragraph (29), good cause or other exceptions exist;

(ii) any other child, if an individual applies for such services with respect to the child; and

(B) enforce any support obligation established with respect to—

(i) a child with respect to whom the State provides services under the plan; or
(ii) the custodial parent of such a child;

(5) provide that (A) in any case in which support payments are collected for an individual with respect to whom an assignment *under section 602(a)(26)* **pursuant to section 608(a)(3)** of this title is effective,

such payments shall be made to the State for distribution pursuant to section 657 of this title and shall not be paid directly to the family, and the individual will be notified on a monthly basis (or on a quarterly basis for so long as the Secretary determines with respect to a State that requiring such notice on a monthly basis would impose an unreasonable administrative burden) of the amount of the support payments collected; *except that this paragraph shall not apply to such payments for any month following the first month in which the amount collected is sufficient to make such family ineligible for assistance under the State plan approved under part A of this subchapter;*, and (B) in any case in which support payments are collected for an individual pursuant to the assignment made under section 1396k of this title, such payments shall be made to the State for distribution pursuant to section 1396k of this title, except that this clause shall not apply to such payments for any month after the month in which the individual ceases to be eligible for medical assistance;

(6) *provide that* **provide that—**

(A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan),

(A) services under the plan shall be made available to residents of other States on the same

terms as to residents of the State submitting the plan;

(B) an application fee for furnishing such services shall be imposed **on individuals not receiving assistance under any State program funded under part A,** which shall be paid by the individual applying for such services, or recovered from the absent parent, or paid by the State out of its own funds (the payment of which from State funds shall not be considered as an administrative cost of the State for the operation of the plan, and shall be considered income to the program), the amount of which (i) will not exceed $25 (or such higher or lower amount (which shall be uniform for all States) as the Secretary may determine to be appropriate for any fiscal year to reflect increases or decreases in administrative costs), and (ii) may vary among such individuals on the basis of ability to pay (as determined by the State),;

(C) a fee of not more than $25 may be imposed in any case where the State requests the Secretary of the Treasury to withhold past-due support owed to or on behalf of such individual from a tax refund pursuant to section 664(a)(2) of this title,;

(D) a fee (in accordance with regulations of the Secretary) for performing genetic tests may be imposed on any individual who is not a recipient of *aid under a State plan approved* **assistance under a State program funded** under part A of this subchapter,; and

(E) any costs in excess of the fees so imposed may be collected—

(i) from the parent who owes the child or spousal support obligation involved, or

(ii) at the option of the State, from the individual to whom such services are made

available, but only if such State has in effect a procedure whereby all persons in such State having authority to order child or spousal support are informed that such costs are to be collected from the individual to whom such services were made available;

(7) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials **and Indian tribes or tribal organizations (as defined in subsections (e) and (l) of section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b))**

(A) to assist the agency administering the plan, including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and

(B) with respect to any other matters of common concern to such courts or officials and the agency administering the plan;

(8) provide that the agency administering the plan will establish a service to locate *absent* **noncustodial** parents utilizing—

(A) all sources of information and available records, and

(B) the Parent Locator Service in the Department of Health and Human Services; **(B) the Federal Parent Locator Service established under section 653;**

(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State—

(A) in establishing paternity, if necessary,

(B) in locating *an absent* **a noncustodial** parent residing in the State (whether or not

permanently) against whom any action is being taken under a program established under a plan approved under this part in another State,

(C) in securing compliance by *an absent* **a noncustodial** parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of the child or children or the parent of such child or children with respect to whom aid is being provided under the plan of such other State, *and*

(D) in carrying out other functions required under a plan approved under this part; **and**

(E) not later than March 1, 1997, in using the forms promulgated pursuant to section 652 (a)(11) for income withholding, imposition of liens, and issuance of administrative subpoenas in interstate child support cases;

(10) provide that the State will maintain a full record of collections and disbursements made under the plan and have an adequate reporting system;

*(11)***(11)(A)** provide that amounts collected as support shall be distributed as provided in section 657 of this title; **and**

*(12)***(B)** provide that any payment required to be made under section 656 or 657 of this title to a family shall be made to the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children;

(12) provide for the establishment of procedures to require the State to provide individuals who are applying for or receiving services under the State plan, or who are parties to cases in which services are being provided under the State plan—

(A) with notice of all proceedings in which support obligations might be established or modified; and

(B) with a copy of any order establishing or modifying a child support obligation, or (in the case of a petition for modification) a notice of determination that there should be no change in the amount of the child support award, within 14 days after issuance of such order or determination;

(13) provide that the State will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating *absent* **noncustodial** parents, establishing paternity, obtaining support orders, and collecting support payments **and provide that information requests by parents who are residents of other States be treated with the same priority as requests by parents who are residents of the State submitting the plan**;

*(14)***(14)(A)** comply with such bonding requirements, for employees who receive, disburse, handle, or have access to, cash, as the Secretary shall by regulations prescribe;

*(15)***(14)(B)** maintain methods of administration which are designed to assure that persons responsible for handling cash receipts shall not participate in accounting or operating functions which would permit them to conceal in the accounting records the misuse of cash receipts (except that the Secretary shall by regulations provide for exceptions to this requirement in the case of sparsely populated areas where the hiring of unreasonable additional staff would otherwise be necessary);

(15) provide for—

(A) a process for annual reviews of and reports to the Secretary on the State program operated under the State plan approved under this part, including such information as may be necessary to measure State compliance with Federal requirements for expedited procedures, using such standards and procedures as are required by the Secretary, under which the State agency will determine the extent to which the program is operated in compliance with this part; and

(B) a process of extracting from the automated data processing system required by paragraph (16) and transmitting to the Secretary data and calculations concerning the levels of accomplishment (and rates of improvement) with respect to applicable performance indicators (including paternity establishment percentages) to the extent necessary for purposes of sections 652(g) and 658;

(16) provide, *at the option of the State,* for the establishment **and operation by the State agency**, in accordance with an (initial and annually updated) advance automated data processing planning document approved under section 652(d) of this title, of a statewide automated data processing and information retrieval system **meeting the requirements of section 654A** designed effectively and efficiently to assist management in the administration of the State plan, *in the State and localities thereof, so as*

(A) **so as** to control, account for, and monitor

(i) all the factors in the support enforcement collection and paternity determination process under such plan *(including, but not limited to, (I) identifiable correlation factors (such as social security numbers, names, dates of birth, home ad-*

dresses and mailing addresses (including postal ZIP codes) of any individual with respect to whom support obligations are sought to be established or enforced and with respect to any person to whom such support obligations are owing) to assure sufficient compatibility among the systems of different jurisdictions to permit periodic screening to determine whether such individual is paying or is obligated to pay support in more than one jurisdiction, (II) checking of records of such individuals on a periodic basis with Federal, intra and inter State, and local agencies, (III) maintaining the data necessary to meet the Federal reporting requirements on a timely basis, and (IV) delinquency and enforcement activities),

(ii) the collection and distribution of support payments (both intra and inter State), the determination, collection, and distribution of incentive payments both inter and intra State, and the maintenance of accounts receivable on all amounts owed, collected and distributed, and

(iii) the costs of all services rendered, either directly or by interfacing with State financial management and expenditure information,

(B) to provide interface with records of the State's aid to families with dependent children program in order to determine if a collection of a support payment causes a change affecting eligibility for or the amount of aid under such program,

(C) to provide for security against unauthorized access to, or use of, the data in such system,

(D) to facilitate the development and improvement of the income withholding and other procedures required under section 666(a) of this title through the monitoring of support payments, the maintenance of accurate records regarding the payment of support, and the prompt provision of notice to appropriate officials with respect to any arrearages in support payments which may occur, and

(E) to provide management information on all cases under the State plan from initial referral or application through collection and enforcement;;

(17) in the case of a State which has in effect an agreement with the Secretary entered into pursuant to section 663 of this title for the use of the Parent Locator Service established under section 653 of this title, provide that the State will accept and transmit to the Secretary requests for information authorized under the provisions of the agreement to be furnished by such Service to authorized persons, will impose and collect (in accordance with regulations of the Secretary) a fee sufficient to cover the costs to the State and to the Secretary incurred by reason of such requests, will transmit to the Secretary from time to time (in accordance with such regulations) so much of the fees collected as are attributable to such costs to the Secretary so incurred, and during the period that such agreement is in effect will otherwise comply with such agreement and regulations of the Secretary with respect thereto;

(18) provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 664 of this title, and take all steps necessary to implement and utilize such procedures;

(19) provide that the agency administering the plan—

(A) shall determine on a periodic basis, from information supplied pursuant to section 508 of the Unemployment Compensation Amendments of 1976, whether any individuals receiving compensation under the State's unemployment compensation law (including amounts payable pursuant to any agreement under any Federal unemployment compensation law) owe child support obligations which are being enforced by such agency, and

(B) shall enforce any such child support obligations which are owed by such an individual but are not being met—

(i) through an agreement with such individual to have specified amounts withheld from compensation otherwise payable to such individual and by submitting a copy of any such agreement to the State agency administering the unemployment compensation law, or

(ii) in the absence of such an agreement, by bringing legal process (as defined in section 662(e) of this title) to require the withholding of amounts from such compensation;

(20) provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the procedures which are prescribed in or pursuant to such laws;

(21)(A) at the option of the State, impose a late payment fee on all overdue support (as defined in section 666(e) of this title) under any obligation being enforced under this part, in an amount equal to a uniform percentage determined by the State (not less than 3 percent nor more than 6 percent) of the overdue support, which shall be payable by the *absent* **noncustodial** parent owing the overdue support; and

(B) assure that the fee will be collected in addition to, and only after full payment of, the overdue support, and that the imposition of the late payment fee shall not directly or indirectly result in a decrease in the amount of the support which is paid to the child (or spouse) to whom, or on whose behalf, it is owed;

(22) in order for the State to be eligible to receive any incentive payments under section 658 of this title, provide that, if one or more political subdivisions of the State participate in the costs of carrying out activities under the State plan during any period, each such subdivision shall be entitled to receive an appropriate share (as determined by the State) of any such incentive payments made to the State for such period, taking into account the efficiency and effectiveness of the activities carried out under the State plan by such political subdivision;

(23) provide that the State will regularly and frequently publicize, through public service announcements, the availability of child support enforcement services under the plan and otherwise, including information as to any application fees for such services and a telephone number or postal address at which further information may be obtained **and will publicize the availability and encourage the use of procedures for voluntary establishment of paternity and child support by means the State deems appropriate;** *and*

(24) provide that if the State, as of October 13, 1988, does not have in effect an automated data

processing and information retrieval system meeting all of the requirements of paragraph (16), the State—

(A) will submit to the Secretary by October 1, 1991, for review and approval by the Secretary within 9 months after submittal an advance automated data processing planning document of the type referred to in such paragraph; and

(B) will have in effect by October 1, 1995, an operational automated data processing and information retrieval system, meeting all the requirements of that paragraph, which has been approved by the Secretary. and;

(24) provide that the State will have in effect an automated data processing and information retrieval system—

(A) by October 1, 1997, which meets all requirements of this part which were enacted on or before the date of enactment of the Family Support Act of 1988, and

(B) by October 1, 2000, which meets all requirements of this part enacted on or before the date of the enactment of the Personal Responsibility and Work Opportunity Act of 1996, except that such deadline shall be extended by 1 day for each day (if any) by which the Secretary fails to meet the deadline imposed by section 344(a)(3) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996;

(25) provide that if a family with respect to which services are provided under the plan ceases to receive assistance under the State program funded under part A, the State shall provide appropriate notice to the family and continue to provide such services, subject to the same conditions and on the same basis as

in the case of other individuals to whom services are furnished under the plan, except that an application or other request to continue services shall not be required of such a family and paragraph (6)(B) shall not apply to the family;

(26) will have in effect safeguards, applicable to all confidential information handled by the State agency, that are designed to protect the privacy rights of the parties, including—

(A) safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, or to establish or enforce support;

(B) prohibitions against the release of information on the whereabouts of 1 party to another party against whom a protective order with respect to the former party has been entered; and

(C) prohibitions against the release of information on the whereabouts of 1 party to another party if the State has reason to believe that the release of the information may result in physical or emotional harm to the former party;

(27) provide that, on and after October 1, 1998, the State agency will—

(A) operate a State disbursement unit in accordance with section 654; and

(B) have sufficient State staff (consisting of State employees) and (at State option) contractors reporting directly to the State agency to—

(i) monitor and enforce support collections through the unit in cases being enforced by the State pursuant to section 654 (4) (including carrying out the automated data processing responsibilities described in section 654A(g)); and

(ii) take the actions described in section 666(c)(1) in appropriate cases;

(28) provide that, on and after October 1, 1997, the State will operate a State Directory of New Hires in accordance with section 653A;

(29) provide that the State agency responsible for administering the State plan—

(A) shall make the determination (and redetermination at appropriate intervals) as to whether an individual who has applied for or is receiving assistance under the State program funded under part A of this title or the State program under title XIX is cooperating in good faith with the State in establishing the paternity of, or in establishing, modifying, or enforcing a support order for, any child of the individual by providing the State agency with the name of, and such other information as the State agency may require with respect to, the noncustodial parent of the child, subject to good cause and other exceptions which—

(i) shall be defined, taking into account the best interests of the child, and

(ii) shall be applied in each case,

by, at the option of the State, the State agency administering the State program under part A, this part, or title XIX;

(B) shall require the individual to supply additional necessary information and appear at interviews, hearings, and legal proceedings;

(C) shall require the individual and the child to submit to genetic tests pursuant to judicial or administrative order;

(D) may request that the individual sign a voluntary acknowledgment of paternity, after

notice of the rights and consequences of such an acknowledgment, but may not require the individual to sign an acknowledgment or otherwise relinquish the right to genetic tests as a condition of cooperation and eligibility for assistance under the State program funded under part A, or the State program under title XIX; and

(E) shall promptly notify the individual, the State agency administering the State program funded under part A, and the State agency administering the State program under title XIX, of each such determination, and if noncooperation is determined, the basis therefor;

(30) provide that the State shall use the definitions established under section 652(a)(5) in collecting and reporting information as required under this part;

(31) provide that the State agency will have in effect a procedure for certifying to the Secretary, for purposes of the procedure under section 652(k), determinations that individuals owe arrearages of child support in an amount exceeding $5,000, under which procedure—

(A) each individual concerned is afforded notice of such determination and the consequences thereof, and an opportunity to contest the determination; and

(B) the certification by the State agency is furnished to the Secretary in such format, and accompanied by such supporting documentation, as the Secretary may require;

(32)(A) provide that any request for services under this part by a foreign reciprocating country or a foreign country with which the State has an arrangement described in section 659A(d)(2) shall be treated as a request by a State;

(B) provide, at State option, notwithstanding paragraph (4) or any other provision of this part, for services under the plan for enforcement of a spousal support order not described in paragraph (4)(B) entered by such a country (or subdivision); and

(C) provide that no applications will be required from, and no costs will be assessed for such services against, the foreign reciprocating country or foreign obligee (but costs may at State option be assessed against the obligor); and

(33) provide that a State that receives funding pursuant to section 628 and that has within its borders Indian country (as defined in section 1151 of title 18, United States Code) may enter into cooperative agreements with an Indian tribe or tribal organization (as defined in subsections (e) and (l) of section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b)), if the Indian tribe or tribal organization demonstrates that such tribe or organization has an established tribal court system or a Court of Indian Offenses with the authority to establish paternity, establish, modify, and enforce support orders, and to enter support orders in accordance with child support guidelines established by such tribe or organization, under which the State and tribe or organization shall provide for the cooperative delivery of child support enforcement services in Indian country and for the forwarding of all funding collected pursuant to the functions performed by the tribe or organization to the State agency, or conversely, by the State agency to the tribe or organization, which shall distribute such funding in accordance with such agreement; and

Nothing in paragraph (33) shall void any provision of any cooperative agreement entered into before the date of the

enactment of such paragraph, nor shall such paragraph deprive any State of jurisdiction over Indian country (as so defined) that is lawfully exercised under section 402 of the Act entitled 'An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes', approved April 11, 1968 (25 U.S.C. 1322).

The State may allow the jurisdiction which makes the collection involved to retain any application fee under paragraph (6)(B) or any late payment fee under paragraph (21).

Sec. 654A. Automated data processing

(a) In general.—In order for a State to meet the requirements of this section, the State agency administering the State program under this part shall have in operation a single statewide automated data processing and information retrieval system which has the capability to perform the tasks specified in this section with the frequency and in the manner required by or under this part.

(b) Program management.—The automated system required by this section shall perform such functions as the Secretary may specify relating to management of the State program under this part, including—

(1) controlling and accounting for use of Federal, State, and local funds in carrying out the program; and

(2) maintaining the data necessary to meet Federal reporting requirements under this part on a timely basis.

(c) Calculation of performance indicators.—In order to enable the Secretary to determine the incentive payments and penalty adjustments required by sections 652(g) and 658, the State agency shall—

(1) use the automated system—

(A) to maintain the requisite data on State performance with respect to paternity establishment and child support enforcement in the State; and

(B) to calculate the paternity establishment percentage for the State for each fiscal year; and

(2) have in place systems controls to ensure the completeness and reliability of, and ready access to, the data described in paragraph (1)(A), and the accuracy of the calculations described in paragraph (1)(B).

(d) Information integrity and security.—The State agency shall have in effect safeguards on the integrity, accuracy, and completeness of, access to, and use of data in the automated system required by this section, which shall include the following (in addition to such other safeguards as the Secretary may specify in regulations):

(1) Policies restricting access.—Written policies concerning access to data by State agency personnel, and sharing of data with other persons, which—

(A) permit access to and use of data only to the extent necessary to carry out the State program under this part; and

(B) specify the data which may be used for particular program purposes, and the personnel permitted access to such data.

(2) Systems controls.—Systems controls (such as passwords or blocking of fields) to ensure strict adherence to the policies described in paragraph (1).

(3) Monitoring of access.—Routine monitoring of access to and use of the automated system, through methods such as audit trails and feedback mechanisms, to guard against and promptly identify unauthorized access or use.

(4) Training and information.—Procedures to ensure that all personnel (including State and local agency staff and contractors) who may have access to or be required to use confidential program data are informed of applicable requirements and penalties (including those in section 6103 of the Internal Revenue Code of 1986), and are adequately trained in security procedures.

(5) Penalties.—Administrative penalties (up to and including dismissal from employment) for unauthorized access to, or disclosure or use of, confidential data.

(e) State case registry.—

(1) Contents.—The automated system required by this section shall include a registry (which shall be known as the 'State case registry') that contains records with respect to—

(A) each case in which services are being provided by the State agency under the State plan approved under this part; and

(B) each support order established or modified in the State on or after October 1, 1998.

(2) Linking of local registries.—The State case registry may be established by linking local case registries of support orders through an automated information network, subject to this section.

(3) Use of standardized data elements.—Such records shall use standardized data elements for both parents (such as names, social security numbers and other uniform identification numbers, dates of birth, and case identification numbers), and contain such other information (such as on case status) as the Secretary may require.

(4) Payment records.—Each case record in the State case registry with respect to which services are

being provided under the State plan approved under this part and with respect to which a support order has been established shall include a record of—

(A) the amount of monthly (or other periodic) support owed under the order, and other amounts (including arrearages, interest or late payment penalties, and fees) due or overdue under the order;

(B) any amount described in subparagraph (A) that has been collected;

(C) the distribution of such collected amounts;

(D) the birth date of any child for whom the order requires the provision of support; and

(E) the amount of any lien imposed with respect to the order pursuant to section 666(a)(4).

(5) Updating and monitoring.—The State agency operating the automated system required by this section shall promptly establish and update, maintain, and regularly monitor, case records in the State case registry with respect to which services are being provided under the State plan approved under this part, on the basis of—

(A) information on administrative actions and administrative and judicial proceedings and orders relating to paternity and support;

(B) information obtained from comparison with Federal, State, or local sources of information;

(C) information on support collections and distributions; and

(D) any other relevant information.

(f) Information comparisons and other disclosures of information. The State shall use the automated system required by this section to extract information from (at such times, and in such standardized format or formats, as may

be required by the Secretary), to share and compare information with, and to receive information from, other data bases and information comparison services, in order to obtain (or provide) information necessary to enable the State agency (or the Secretary or other State or Federal agencies) to carry out this part, subject to section 6103 of the Internal Revenue Code of 1986. Such information comparison activities shall include the following:

(1) Federal Case Registry of Child Support Orders.—Furnishing to the Federal Case Registry of Child Support Orders established under section 653(h) (and update as necessary, with information including notice of expiration of orders) the minimum amount of information on child support cases recorded in the State case registry that is necessary to operate the registry (as specified by the Secretary in regulations).

(2) Federal Parent Locator Service.—Exchanging information with the Federal Parent Locator Service for the purposes specified in section 653.

(3) Temporary family assistance and medicaid agencies.—Exchanging information with State agencies (of the State and of other States) administering programs funded under part A, programs operated under a State plan approved under title XIX, and other programs designated by the Secretary, as necessary to perform State agency responsibilities under this part and under such programs.

(4) Intrastate and interstate information comparisons.—Exchanging information with other agencies of the State, agencies of other States, and interstate information networks, as necessary and appropriate to carry out (or assist other States to carry out) the purposes of this part.

(g) Collection and distribution of support payments.—

(1) In general.—The State shall use the automated system required by this section, to the maximum extent feasible, to assist and facilitate the collection and disbursement of support payments through the State disbursement unit operated under section 654B, through the performance of functions, including, at a minimum—

(A) transmission of orders and notices to employers (and other debtors) for the withholding of income—

(i) within 2 business days after receipt of notice of, and the income source subject to, such withholding from a court, another State, an employer, the Federal Parent Locator Service, or another source recognized by the State; and

(ii) using uniform formats prescribed by the Secretary;

(B) ongoing monitoring to promptly identify failures to make timely payment of support; and

(C) automatic use of enforcement procedures (including procedures authorized pursuant to section 666(c)) if payments are not timely made.

(2) Business day defined.—As used in paragraph (1), the term 'business day' means a day on which State offices are open for regular business.

(h) Expedited administrative procedures.—The automated system required by this section shall be used, to the maximum extent feasible, to implement the expedited administrative procedures required by section 666(c).

Sec. 654B. Collection and disbursement of support payments.

(a) State disbursement unit.—

(1) In general.—In order for a State to meet the requirements of this section, the State agency must establish and operate a unit (which shall be known as the 'State disbursement unit') for the collection and disbursement of payments under support orders—

(A) in all cases being enforced by the State pursuant to section 654(4); and

(B) in all cases not being enforced by the State under this part in which the support order is initially issued in the State on or after January 1, 1994, and in which the income of the noncustodial parent is subject to withholding pursuant to section 666(a)(8)(B).

(2) Operation.—The State disbursement unit shall be operated—

(A) directly by the State agency (or 2 or more State agencies under a regional cooperative agreement), or (to the extent appropriate) by a contractor responsible directly to the State agency; and

(B) except in cases described in paragraph (1)(B), in coordination with the automated system established by the State pursuant to section 654A.

(3) Linking of local disbursement units.—The State disbursement unit may be established by linking local disbursement units through an automated information network, subject to this section, if the Secretary agrees that the system will not cost more nor take more time to establish or operate than a centralized system. In addition, employers shall be given 1 location to which income withholding is sent.

(b) Required procedures.—The State disbursement unit shall use automated procedures, electronic processes, and computer-driven technology to the maximum extent feasible, efficient, and economical, for the collection and disbursement of support payments, including procedures—

(1) for receipt of payments from parents, employers, and other States, and for disbursements to custodial parents and other obligees, the State agency, and the agencies of other States;

(2) for accurate identification of payments;

(3) to ensure prompt disbursement of the custodial parent's share of any payment; and

(4) to furnish to any parent, upon request, timely information on the current status of support payments under an order requiring payments to be made by or to the parent, except that in cases described in subsection (a)(1)(B), the State disbursement unit shall not be required to convert and maintain in automated form records of payments kept pursuant to section 666(a)(8)(B)(iii) before the effective date of this section.

(c) Timing of disbursements.—

(1) In general.—Except as provided in paragraph (2), the State disbursement unit shall distribute all amounts payable under section 657(a) within 2 business days after receipt from the employer or other sources of periodic income, if sufficient information identifying the payee is provided.

(2) Permissive retention of arrearages.—The State disbursement unit may delay the distribution of collections toward arrearages until the resolution of any timely appeal with respect to such arrearages.

(d) Business day defined.—As used in this section, the term 'business day' means a day on which State offices are open for regular business.

Sec. 655. Payments to States

(a) Amounts payable each quarter

(1) From the sums appropriated therefor, the Secretary shall pay to each State for each quarter an amount—

(A) equal to the percent specified in paragraph (2) of the total amounts expended by such State during such quarter for the operation of the plan approved under section 654 of this title,

(B) equal to *90 percent* **the percent specified in paragraph (3)** (rather than the percent specified in subparagraph (A)) of *so much of* the sums expended during such quarter as are attributable to the planning, design, development, installation or enhancement of an automatic data processing and information retrieval system (including in such terms the full cost of the hardware components of such system) *which the Secretary finds meets the requirements specified in section 654(16) of this title, or meets such requirements without regard to clause (D) thereof, and,* **and**

(C) equal to 90 percent (rather than the percentage specified in subparagraph (A)) of so much of the sums expended during such quarter as are attributable to laboratory costs incurred in determining paternity;

except that no amount shall be paid to any State on account of amounts expended to carry out an agreement which it has entered into pursuant to section 663 of this title. In determining the total amounts expended by any State during a quarter, for purposes of this subsection, there shall be excluded an amount equal to the total of any

fees collected or other income resulting from services provided under the plan approved under this part.

(2) The percent applicable to quarters in a fiscal year for purposes of paragraph (1)(A) is—

(A) 70 percent for fiscal years 1984, 1985, 1986, and 1987,

(B) 68 percent for fiscal years 1988 and 1989, and

(C) 66 percent for fiscal year 1990 and each fiscal year thereafter.

(3)(A) The Secretary shall pay to each State, for each quarter in fiscal years 1996 and 1997, 90 percent of so much of the State expenditures described in paragraph (1)(B) as the Secretary finds are for a system meeting the requirements specified in section 654(16) (as in effect on September 30, 1995) but limited to the amount approved for States in the advance planning documents of such States submitted on or before September 30, 1995.

(B)(i) The Secretary shall pay to each State, for each quarter in fiscal years 1996 through 2001, the percentage specified in clause (ii) of so much of the State expenditures described in paragraph (1)(B) as the Secretary finds are for a system meeting the requirements of sections 654(16) and 654A.

(ii) The percentage specified in this clause is 80 percent.

(b) Estimate of amounts payable; installment payments

(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsection (a) of this section for such quarter, such estimates to be based on (A)

a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsection, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2) Subject to subsection (d) of this section, the Secretary shall then pay, in such installments as he may determine, to the State the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(3) Upon the making of any estimate by the Secretary under this subsection, any appropriations available for payments under this section shall be deemed obligated.

(c) Repealed. Pub. L. 97-248, title I, Sec. 174(b), Sept. 3, 1982, 96 Stat. 403

(d) State reports

Notwithstanding any other provision of law, no amount shall be paid to any State under this section for any quarter, prior to the close of such quarter, unless for the period consisting of all prior quarters for which payment is authorized to be made to such State under subsection (a) of this section, there shall have been submitted by the State to the Secretary, with respect to each quarter in such period (other than the last two quarters in such period), a full and complete report (in such form and

manner and containing such information as the Secretary shall prescribe or require) as to the amount of child support collected and disbursed and all expenditures with respect to which payment is authorized under subsection (a) of this section.

(e) Special project grants for interstate enforcement; appropriations

(1) In order to encourage and promote the development and use of more effective methods of enforcing support obligations under this part in cases where either the children on whose behalf the support is sought or their *absent* **noncustodial** parents do not reside in the State where such cases are filed, the Secretary is authorized to make grants, in such amounts and on such terms and conditions as the Secretary determines to be appropriate, to States which propose to undertake new or innovative methods of support collection in such cases and which will use the proceeds of such grants to carry out special projects designed to demonstrate and test such methods.

(2) A grant under this subsection shall be made only upon a finding by the Secretary that the project involved is likely to be of significant assistance in carrying out the purpose of this subsection; and with respect to such project the Secretary may waive any of the requirements of this part which would otherwise be applicable, to such extent and for such period as the Secretary determines is necessary or desirable in order to enable the State to carry out the project.

(3) At the time of its application for a grant under this subsection the State shall submit to the Secretary a statement describing in reasonable detail the project for which the proceeds of the grant are to be used, and the State shall from time to time thereafter submit to the Secretary such reports with respect to the project as the Secretary may specify.

(4) Amounts expended by a State in carrying out a special project assisted under this section shall be considered, for purposes of section 658(b) of this title (as amended by section 5(a) of the Child Support Enforcement Amendments of 1984), to have been expended for the operation of the State's plan approved under section 654 of this title.

(5) There is authorized to be appropriated the sum of $7,000,000 for fiscal year 1985, $12,000,000 for fiscal year 1986, and $15,000,000 for each fiscal year thereafter, to be used by the Secretary in making grants under this subsection.

([f])(b) The Secretary may, in appropriate cases, make direct payments under this part to an Indian tribe or tribal organization which has an approved child support enforcement plan under this title. In determining whether such payments are appropriate, the Secretary shall, at a minimum, consider whether services are being provided to eligible Indian recipients by the State agency through an agreement entered into pursuant to section 654(34).

Sec. 656. Support obligation as obligation to State; amount; discharge in bankruptcy

(a)(1) The support rights assigned to the State under section 602(a)(26) of this title or secured on behalf of a child receiving foster care maintenance payments shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes.

(2) The amount of such obligation shall be—

(A) the amount specified in a court order which covers the assigned support rights, or

(B) if there is no court order, an amount determined by the State in accordance with a formula approved by the Secretary, and

(3) Any amounts collected from *an absent* **a noncustodial** parent under the plan shall reduce, dollar for dollar, the amount of his obligation under subparagraphs (A) and (B) of paragraph (2).

(b) A debt which is a child support obligation assigned to a State under section 602(a)(26) of this title is not released by a discharge in bankruptcy under title 11.

(b) Nondischargeability.—A debt (as defined in section 101 of title 11 of the United States Code) owed under State law to a State (as defined in such section) or municipality (as defined in such section) that is in the nature of support and that is enforceable under this part is not released by a discharge in bankruptcy under title 11 of the United States Code.

Sec. 657. Distribution of proceeds

(a) Amount collected during fifteen month period beginning July 1, 1975

The amounts collected as child support by a State pursuant to a plan approved under this part during the 15 months beginning July 1, 1975, shall be distributed as follows:

(1) 40 per centum of the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without any decrease in the amount paid as assistance to such family during such month;

(2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing);

(3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court order shall be paid to the family; and

(4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2), and (3) shall be (A) retained by the State (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing) as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family.

(b) Amount collected during any fiscal year beginning after September 30, 1976

The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d) of this section) be distributed as follows:

(1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

(2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period (with appropriate reimbursement

of the Federal Government to the extent of its participation in the financing);

(3) such amounts as are in excess of amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court or administrative order shall be paid to the family; and

(4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2), and (3) shall be (A) retained by the State (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing) as reimbursement for any past assistance payments made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family.

(c) Collection after termination of assistance; distribution of support proceeds

Whenever a family with respect to which child support enforcement services have been provided pursuant to section 654(4) of this title ceases to receive assistance under part A of this subchapter, the State shall provide appropriate notice to the family and continue to provide such services, and pay any amount of support collected, subject to the same conditions and on the same basis as in the case of the individuals to whom services are furnished pursuant to section 654(6) of this title, except that no application or other request to continue services shall be required of a family to which this subsection applies, and the provisions of section 654(6)(B) of this title may not be applied.

(d) Disposition of amounts collected by State as child support on behalf of children for whom public agencies make foster care payments

Notwithstanding the preceding provisions of this section, amounts collected by a State as child support for

months in any period on behalf of a child for whom a public agency is making foster care maintenance payments under part E of this subchapter

(1) shall be retained by the State to the extent necessary to reimburse it for the foster care maintenance payments made with respect to the child during such period (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing);

(2) shall be paid to the public agency responsible for supervising the placement of the child to the extent that the amounts collected exceed the foster care maintenance payments made with respect to the child during such period but not the amounts required by a court or administrative order to be paid as support on behalf of the child during such period; and the responsible agency may use the payments in the manner it determines will serve the best interests of the child, including setting such payments aside for the child's future needs or making all or a part thereof available to the person responsible for meeting the child's day to day needs; and

(3) shall be retained by the State, if any portion of the amounts collected remains after making the payments required under paragraphs (1) and (2), to the extent that such portion is necessary to reimburse the State (with appropriate reimbursement to the Federal Government to the extent of its participation in the financing) for any past foster care maintenance payments (or payments of aid to families with dependent children) which were made with respect to the child (and with respect to which past collections have not previously been retained);

and any balance shall be paid to the State agency responsible for supervising the placement of the child, for use by such agency in accordance with paragraph (2).

Sec. 657. Distribution of collected support

(a) In general.—Subject to subsection (e), an amount collected on behalf of a family as support by a State pursuant to a plan approved under this part shall be distributed as follows:

(1) Families receiving assistance.—In the case of a family receiving assistance from the State, the State shall—

(A) pay to the Federal Government the Federal share of the amount so collected; and

(B) retain, or distribute to the family, the State share of the amount so collected.

(2) Families that formerly received assistance.—In the case of a family that formerly received assistance from the State:

(A) Current support payments.—To the extent that the amount so collected does not exceed the amount required to be paid to the family for the month in which collected, the State shall distribute the amount so collected to the family.

(B) Payments of arrearages.—To the extent that the amount so collected exceeds the amount required to be paid to the family for the month in which collected, the State shall distribute the amount so collected as follows:

(i) Distribution of arrearages that accrued after the family ceased to receive assistance.—

(I) Pre-October 1997.—Except as provided in subclause (II), the provisions of this section (other than subsection (b)(1)) as in effect and applied on the day before the date of the

enactment of section 302 of the Personal Responsibility and Work Opportunity Act Reconciliation of 1996 shall apply with respect to the distribution of support arrearages that—

(aa) accrued after the family ceased to receive assistance, and

(bb) are collected before October 1, 1997.

(II) Post-September 1997.—With respect to the amount so collected on or after October 1, 1997 (or before such date, at the option of the State)—

(aa) In general.—The State shall first distribute the amount so collected (other than any amount described in clause (iv)) to the family to the extent necessary to satisfy any support arrearages with respect to the family that accrued after the family ceased to receive assistance from the State.

(bb) Reimbursement of governments for assistance provided to the family.—After the application of division (aa) and clause (ii)(II)(aa) with respect to the amount so collected, the State shall retain the State share of the amount so collected, and pay to the Federal Government the Federal share (as defined in subsection (c)(2)) of the amount so collected, but only to the extent nec-

essary to reimburse amounts paid to the family as assistance by the State.

(cc) Distribution of the remainder to the family.—To the extent that neither division (aa) nor division (bb) applies to the amount so collected, the State shall distribute the amount to the family.

(ii) Distribution of arrearages that accrued before the family received assistance.—

(I) Pre-October 2000.—Except as provided in subclause (II), the provisions of this section (other than subsection (b)(1)) as in effect and applied on the day before the date of the enactment of section 302 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 shall apply with respect to the distribution of support arrearages that—

(aa) accrued before the family received assistance, and

(bb) are collected before October 1, 2000.

(II) Post-September 2000.—Unless, based on the report required by paragraph (4), the Congress determines otherwise, with respect to the amount so collected on or after October 1, 2000 (or before such date, at the option of the State)—

(aa) In general.—The State shall first distribute the amount

so collected (other than any amount described in clause (iv)) to the family to the extent necessary to satisfy any support arrearages with respect to the family that accrued before the family received assistance from the State.

(bb) Reimbursement of governments for assistance provided to the family.—After the application of clause (i)(II)(aa) and division (aa) with respect to the amount so collected, the State shall retain the State share of the amount so collected, and pay to the Federal Government the Federal share (as defined in subsection (c)(2)) of the amount so collected, but only to the extent necessary to reimburse amounts paid to the family as assistance by the State.

(cc) Distribution of the remainder to the family.—To the extent that neither division (aa) nor division (bb) applies to the amount so collected, the State shall distribute the amount to the family.

(iii) Distribution of arrearages that accrued while the family received assistance.—In the case of a family described in this subparagraph, the provisions of paragraph (1) shall apply with respect to the distribution of support arrearages that accrued while the family received assistance.

(iv) Amounts collected pursuant to section 664. —Notwithstanding any other provision of this section, any amount of support collected pursuant to section 664 shall be retained by the State to the extent past-due support has been assigned to the State as a condition of receiving assistance from the State, up to the amount necessary to reimburse the State for amounts paid to the family as assistance by the State. The State shall pay to the Federal Government the Federal share of the amounts so retained. To the extent the amount collected pursuant to section 664 exceeds the amount so retained, the State shall distribute the excess to the family.

(v) Ordering rules for distributions.—For purposes of this subparagraph, unless an earlier effective date is required by this section, effective October 1, 2000, the State shall treat any support arrearages collected, except for amounts collected pursuant to section 664, as accruing in the following order:

(I) To the period after the family ceased to receive assistance.

(II) To the period before the family received assistance.

(III) To the period while the family was receiving assistance.

(3) Families that never received assistance.—In the case of any other family, the State shall distribute the amount so collected to the family.

(4) Families under certain agreements.—In the case of a family receiving assistance from an Indian tribe, distribute the amount so collected pursuant to

an agreement entered into pursuant to a State plan under section 654(33).

(5) Study and report.—Not later than October 1, 1998, the Secretary shall report to the Congress the Secretary's findings with respect to—

(A) whether the distribution of post-assistance arrearages to families has been effective in moving people off of welfare and keeping them off of welfare;

(B) whether early implementation of a pre-assistance arrearage program by some States has been effective in moving people off of welfare and keeping them off of welfare;

(C) what the overall impact has been of the amendments made by the Personal Responsibility and Work Opportunity Act of 1996 with respect to child support enforcement in moving people off of welfare and keeping them off of welfare; and

(D) based on the information and data the Secretary has obtained, what changes, if any, should be made in the policies related to the distribution of child support arrearages.

(b) Continuation of assignments.—Any rights to support obligations, which were assigned to a State as a condition of receiving assistance from the State under part A and which were in effect on the day before the date of the enactment of the Personal Responsibility and Work Opportunity Act of 1996, shall remain assigned after such date.

(c) Definitions.—As used in subsection (a):

(1) Assistance.—The term 'assistance from the State' means—

(A) assistance under the State program funded under part A or under the State plan

approved under part A of this title (as in effect on the day before the date of the enactment of the Personal Responsibility and Work Opportunity Act of 1996); and

(B) foster care maintenance payments under the State plan approved under part E of this title.

(2) Federal share.—The term 'Federal share' means that portion of the amount collected resulting from the application of the Federal medical assistance percentage in effect for the fiscal year in which the amount is collected.

(3) Federal medical assistance percentage.—The term 'Federal medical assistance percentage' means—

(A) the Federal medical assistance percentage (as defined in section 1118), in the case of Puerto Rico, the Virgin Islands, Guam, and American Samoa; or

(B) the Federal medical assistance percentage (as defined in section 1905(b), as in effect on September 30, 1996) in the case of any other State.

(4) State share.—The term 'State share' means 100 percent minus the Federal share.

(d) Hold harmless provision.—If the amounts collected which could be retained by the State in the fiscal year (to the extent necessary to reimburse the State for amounts paid to families as assistance by the State) are less than the State share of the amounts collected in fiscal year 1995 (determined in accordance with section 657 as in effect on the day before the date of the enactment of the Personal Responsibility and Work Opportunity Act of 1996), the State share for the fiscal year shall be an amount equal to the State share in fiscal year 1995.

(e) Gap payments not subject to distribution under this section.—At State option, this section shall not

apply to any amount collected on behalf of a family as support by the State (and paid to the family in addition to the amount of assistance otherwise payable to the family) pursuant to a plan approved under this part if such amount would have been paid to the family by the State under section 602(a)(28), as in effect and applied on the day before the date of the enactment of section 302 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. For purposes of subsection (d), the State share of such amount paid to the family shall be considered amounts which could be retained by the State if such payments were reported by the State as part of the State share of amounts collected in fiscal year 1995.

Sec. 658. Incentive payments to States

(a) Purpose; requirement; quarterly payments

In order to encourage and reward State child support enforcement programs which perform in a cost-effective and efficient manner to secure support for all children who have sought assistance in securing support, whether such children reside within the State or elsewhere and whether or not they are eligible for *aid to families with dependent children under a State plan approved under part A of this subchapter* **assistance under a program funded under part A**, and regardless of the economic circumstances of their parents, the Secretary shall, from support collected which would otherwise represent the Federal share of assistance to families of *absent* **noncustodial** parents, pay to each state for each fiscal year, on a quarterly basis (as described in subsection (e) of this section) beginning with the quarter commencing October 1, 1985, an incentive payment in an amount determined under subsection (b) of this section.

(b) Incentive formula

(1) Except as provided in paragraphs (2), (3), and (4), the incentive payment shall be equal to—

(A) 6 percent of the total amount of support collected under the plan during the fiscal year in cases in which the support obligation involved is assigned to the State pursuant to section *602(a)(26)* **608(a)(3)** or section 671(a)(17) of this title (and such total amount for any fiscal year being hereafter referred to in this section as the State's "*AFDC collections* **title IV-A collections**" for that year), plus

(B) 6 percent of the total amount of support collected during the fiscal year in all other cases under this part (with such total amount for any fiscal year being hereafter referred to in this section as the State's "*non/AFDC collections* **non-title IV-A collections**" for that year).

(2) If subsection (c) of this section applies with respect to a State's *AFDC collections* **title IV-A coltions** or *non-AFDC collections* **non-title IV-A collections** for any fiscal year, the percent specified in paragraph (1)(A) or (B) (with respect to such collections) shall be increased to the higher percent determined under such subsection (with respect to such collections) in determining the State's incentive payment under this subsection for that year.

(3) The dollar amount of the portion of the State's incentive payment for any fiscal year which is determined on the basis of its *non/AFDC collections* **non-title IV-A collections** under paragraph (1)(B) (after adjustment under subsection (c) of this section if applicable) shall in no case exceed—

(A) the dollar amount of the portion of such payment which is determined on the basis of its *AFDC collections* **title IV-A collections** under paragraph (1)(A) (after adjustment under subsection (c) of this section if applicable) in the case of fiscal year 1986 or 1987;

(B) 105 percent of such dollar amount in the case of fiscal year 1988;

(C) 110 percent of such dollar amount in the case of fiscal year 1989; or

(D) 115 percent of such dollar amount in the case of fiscal year 1990 or any fiscal year thereafter.

(4) The Secretary shall make such additional payments to the State under this part, for fiscal year 1986 or 1987, as may be necessary to assure that the total amount of payments under this section and section 655(a)(1)(A) of this title for such fiscal year is no less than 80 percent of the amount that would have been payable to that State and its political subdivisions for such fiscal year under this section and section 655(a)(1)(A) of this title if those sections (including the amendment made by section 5(c)(2)(A) of the Child Support Enforcement Amendments of 1984) had remained in effect as they were in effect for fiscal year 1985.

(c) Increase in percentage; laboratory costs

If the total amount of a State's *AFDC collections* **title IV-A collections** or *non/AFDC collections* **non-title IV-A collections** for any fiscal year bears a ratio to the total amount expended by the State in that year for the operation of its plan approved under section 654 of this title for which payment may be made under section 655 of this title (with the total amount so expended in any fiscal year being hereafter referred to in this section as the State's "*combined AFDC/non/AFDC administrative costs* **combined title IV-A/non-title IV-A administrative costs**" for that year) which is equal to or greater than 1.4, the relevant percent specified in subparagraph (A) or (B) of this subsection (b)(1) of this section (with respect to such collections) shall be increased to—

(1) 6.5 percent, plus

(2) one-half of 1 percent for each full two-tenths by which such ratio exceeds 1.4;

except that the percent so specified shall in no event be increased, for either *AFDC collections* **title IV-A collections** or *non/AFDC collections* **non-title IV-A collections**) to more than 10 percent. For purposes of the preceding sentence, laboratory costs incurred in determining paternity in any fiscal year may at the option of the State be excluded from the State's *combined AFDC/non/AFDC administrative costs* **combined title IV-A/non-title IV-A administrative costs** for that year.

(d) Support collected on behalf of individuals residing in another State

In computing incentive payments under this section, support which is collected by one State at the request of another State shall be treated as having been collected in full by each such State, and any amounts expended by the State in carrying out a special project assisted under section 655(e) of this title shall be excluded.

(e) Estimates by Secretary; quarterly payments

The amounts of the incentive payments to be made to the various States under this section for any fiscal year shall be estimated by the Secretary at or before the beginning of such year on the basis of the best information available. The Secretary shall make such payments for such year, on a quarterly basis (with each quarterly payment being made no later than the beginning of the quarter involved), in the amounts so estimated, reduced or increased to the extent of any overpayments or underpayments which the Secretary determines were made under this section to the States involved for prior periods and with respect to which adjustment has not already been made under this subsection. Upon the making of any estimate by the Secretary under the preceding sentence, any appropriations available for payments under this section shall be deemed obligated.

Sec. 659. Enforcement of individual's legal obligations to provide child support or make alimony payments

(a) United States and District of Columbia to be subject to legal process

Notwithstanding any other provision of law (including section 407 of this title), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

(b) Methods of service of legal process

Service of legal process brought for the enforcement of an individual's obligation to provide child support or make alimony payments shall be accomplished by certified or registered mail, return receipt requested, or by personal service, upon the appropriate agent designated for receipt of such service of process pursuant to regulations promulgated pursuant to section 661 of this title (or, if no agent has been designated for the governmental entity having payment responsibility for the moneys involved, then upon the head of such governmental entity). Such process shall be accompanied by sufficient data to permit prompt identification of the individual and the moneys involved.

(c) Disclosure of information in answering interrogatories; disciplinary action or civil or criminal liability or penalty prohibited

No Federal employee whose duties include responding to interrogatories pursuant to requirements imposed by section 661(b)(3) of this title shall be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or on account of, any dislosure of information made by him in connection with the carrying out of any of his duties which pertain (directly or indirectly) to the answering of any such interrogatory.

(d) Notice

Whenever any person, who is designated by law or regulation to accept service of process to which the United States is subject under this section, is effectively served with any such process or with interrogatories relating to an individual's child support or alimony payment obligations, such person shall respond thereto within thirty days (or within such longer period as may be prescribed by applicable State law) after the date effective service thereof is made, and shall, as soon as possible but not later than fifteen days after the date effective service is so made of any such process, send written notice that such process has been so served (together with a copy thereof) to the individual whose moneys are affected thereby at his duty station or last known home address.

(e) Variance in normal pay and disbursement cycles not required

Governmental entities affected by legal processes served for the enforcement of an individual's child support or alimony payment obligations shall not be required to vary their normal pay and disbursement cycles in order to comply with any such legal process.

(f) Non-liability of United States, disbursing officers, and governmental entities with respect to payments

Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the

United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

Sec. 659. Consent by the United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations

(a) Consent to support enforcement.—Notwithstanding any other provision of law (including section 207 of this Act and section 5301 of title 38, United States Code), effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to withholding in accordance with State law enacted pursuant to subsections (a)(1) and (b) of section 666 and regulations of the Secretary under such subsections, and to any other legal process brought, by a State agency administering a program under a State plan approved under this part or by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

(b) Consent to requirements applicable to private person.—With respect to notice to withhold income pursuant to subsection (a)(1) or (b) of section 666, or any other order or process to enforce support obligations against an individual (if the order or process contains or is accompanied by sufficient data to permit prompt identification of the individual and the moneys involved), each governmental entity specified in subsection (a) shall be subject to the same requirements as would apply if the

entity were a private person, except as otherwise provided in this section.

(c) Designation of agent; response to notice or process—

(1) Designation of agent.—The head of each agency subject to this section shall—

(A) designate an agent or agents to receive orders and accept service of process in matters relating to child support or alimony; and

(B) annually publish in the Federal Register the designation of the agent or agents, identified by title or position, mailing address, and telephone number.

(2) Response to notice or process.—If an agent designated pursuant to paragraph (1) of this subsection receives notice pursuant to State procedures in effect pursuant to subsection (a)(1) or (b) of section 666, or is effectively served with any order, process, or interrogatory, with respect to an individual's child support or alimony payment obligations, the agent shall—

(A) as soon as possible (but not later than 15 days) thereafter, send written notice of the notice or service (together with a copy of the notice or service) to the individual at the duty station or last-known home address of the individual;

(B) within 30 days (or such longer period as may be prescribed by applicable State law) after receipt of a notice pursuant to such State procedures, comply with all applicable provisions of section 666; and

(C) within 30 days (or such longer period as may be prescribed by applicable State law) after effective service of any other such order, process, or interrogatory, respond to the order, process, or interrogatory.

(d) Priority of claims.—If a governmental entity specified in subsection (a) receives notice or is served with process, as provided in this section, concerning amounts owed by an individual to more than 1 person—

(1) support collection under section 666(b) must be given priority over any other process, as provided in section 666(b)(7);

(2) allocation of moneys due or payable to an individual among claimants under section 666(b) shall be governed by section 666(b) and the regulations prescribed under such section; and

(3) such moneys as remain after compliance with paragraphs (1) and (2) shall be available to satisfy any other such processes on a first-come, first-served basis, with any such process being satisfied out of such moneys as remain after the satisfaction of all such processes which have been previously served.

(e) No requirement to vary pay cycles.—A governmental entity that is affected by legal process served for the enforcement of an individual's child support or alimony payment obligations shall not be required to vary its normal pay and disbursement cycle in order to comply with the legal process.

(f) Relief from liability.—

(1) Neither the United States, nor the government of the District of Columbia, nor any disbursing officer shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if the payment is made in accordance with this section and the regulations issued to carry out this section.

(2) No Federal employee whose duties include taking actions necessary to comply with the requirements of subsection (a) with regard to any individual shall be subject under any law to any disciplinary action

or civil or criminal liability or penalty for, or on account of, any disclosure of information made by the employee in connection with the carrying out of such actions.

(g) Regulations.—Authority to promulgate regulations for the implementation of this section shall, insofar as this section applies to moneys due from (or payable by)—

(1) the United States (other than the legislative or judicial branches of the Federal Government) or the government of the District of Columbia, be vested in the President (or the designee of the President);

(2) the legislative branch of the Federal Government, be vested jointly in the President pro tempore of the Senate and the Speaker of the House of Representatives (or their designees), and

(3) the judicial branch of the Federal Government, be vested in the Chief Justice of the United States (or the designee of the Chief Justice).

(h) Moneys subject to process.—

(1) In general.—Subject to paragraph (2), moneys paid or payable to an individual which are considered to be based upon remuneration for employment, for purposes of this section—

(A) consist of—

(i) compensation paid or payable for personal services of the individual, whether the compensation is denominated as wages, salary, commission, bonus, pay, allowances, or otherwise (including severance pay, sick pay, and incentive pay);

(ii) periodic benefits (including a periodic benefit in section 228(h)(3)) or other payments—

(I) under the insurance system established by title II;

(II) under any other system or fund established by the United States which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by the individual or any other individual;

(III) as compensation for death under any Federal program;

(IV) under any Federal program established to provide 'black lung' benefits; or

(V) by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation; and

(iii) worker's compensation benefit paid under Federal or State law but

(B) do not include any payment—

(i) by way of reimbursement or otherwise, to defray expenses incurred by the individual in carrying out duties associated with the employment of the individual; or

(ii) as allowances for members of the uniformed services payable pursuant to chapter 7 of title 37, United States Code, as prescribed by the Secretaries concerned (defined by section 101(5) of such title) as necessary for the efficient performance of duty.

(2) Certain amounts excluded.—In determining the amount of any moneys due from, or payable by, the United States to any individual, there shall be excluded amounts which—

(A) are owed by the individual to the United States;

(B) are required by law to be, and are, deducted from the remuneration or other payment involved, including Federal employment taxes, and fines and forfeitures ordered by court-martial;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of the amounts is authorized or required by law and if amounts withheld are not greater than would be the case if the individual claimed all dependents to which he was entitled (the withholding of additional amounts pursuant to section 3402(i) of the Internal Revenue Code of 1986 may be permitted only when the individual presents evidence of a tax obligation which supports the additional withholding);

(D) are deducted as health insurance premiums;

(E) are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage); or

(F) are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage).

(i) Definitions.—For purposes of this section—

(1) United States.—The term 'United States' includes any department, agency, or instrumentality of the legislative, judicial, or executive branch of the Federal Government, the United States Postal Service,

the Postal Rate Commission, any Federal corporation created by an Act of Congress that is wholly owned by the Federal Government, and the governments of the territories and possessions of the United States.

(2) Child support.—The term 'child support', when used in reference to the legal obligations of an individual to provide such support, means amounts required to be paid under a judgment, decree, or order, whether temporary, final, or subject to modification, issued by a court or an administrative agency of competent jurisdiction, for the support and maintenance of a child, including a child who has attained the age of majority under the law of the issuing State, or a child and the parent with whom the child is living, which provides for monetary support, health care, arrearages or reimbursement, and which may include other related costs and fees, interest and penalties, income withholding, attorney's fees, and other relief.

(3) Alimony.—

(A) In general.—The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual, and (subject to and in accordance with State law) includes separate maintenance, alimony pendente lite, maintenance, and spousal support, and includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

(B) Exceptions.—Such term does not include—

(i) any child support; or

(ii) any payment or transfer of property or its value by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(4) Private person.—The term 'private person' means a person who does not have sovereign or other special immunity or privilege which causes the person not to be subject to legal process.

(5) Legal process.—The term 'legal process' means any writ, order, summons, or other similar process in the nature of garnishment—

(A) which is issued by—

(i) a court or an administrative agency of competent jurisdiction in any State, territory, or possession of the United States;

(ii) a court or an administrative agency of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor the process; or

(iii) an authorized official pursuant to an order of such a court or an administrative agency of competent jurisdiction or pursuant to State or local law; and

(B) which is directed to, and the purpose of which is to compel, a governmental entity which holds moneys which are otherwise payable to an individual to make a payment from the moneys to another party in order to satisfy a legal obligation of the individual to provide child support or make alimony payments.

Sec. 659A. International support enforcement

(a) Authority for declarations.—

(1) Declaration.—The Secretary of State, with the concurrence of the Secretary of Health and Human Services, is authorized to declare any foreign country (or a political subdivision thereof) to be a foreign reciprocating country if the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of duties of support owed to obligees who are residents of the United States, and such procedures are substantially in conformity with the standards prescribed under subsection (b).

(2) Revocation.—A declaration with respect to a foreign country made pursuant to paragraph (1) may be revoked if the Secretaries of State and Health and Human Services determine that—

(A) the procedures established by the foreign country regarding the establishment and enforcement of duties of support have been so changed, or the foreign country's implementation of such procedures is so unsatisfactory, that such procedures do not meet the criteria for such a declaration; or

(B) continued operation of the declaration is not consistent with the purposes of this part.

(3) Form of declaration.—A declaration under paragraph (1) may be made in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis.

(b) Standards for foreign support enforcement procedures.—

(1) Mandatory elements.—Support procedures of a foreign country which may be the subject of a

declaration pursuant to subsection (a)(1) shall include the following elements:

(A) The foreign country (or political subdivision thereof) has in effect procedures, available to residents of the United States—

(i) for establishment of paternity, and for establishment of orders of support for children and custodial parents; and

(ii) for enforcement of orders to provide support to children and custodial parents, including procedures for collection and appropriate distribution of support payments under such orders.

(B) The procedures described in subparagraph (A), including legal and administrative assistance, are provided to residents of the United States at no cost.

(C) An agency of the foreign country is designated as a Central Authority responsible for—

(i) facilitating support enforcement in cases involving residents of the foreign country and residents of the United States; and

(ii) ensuring compliance with the standards established pursuant to this subsection.

(2) Additional elements.—The Secretary of Health and Human Services and the Secretary of State, in consultation with the States, may establish such additional standards as may be considered necessary to further the purposes of this section.

(c) Designation of United States Central Authority.—It shall be the responsibility of the Secretary of Health and Human Services to facilitate support enforcement in cases involving residents of the United States and residents of foreign countries that are the subject of a declaration under this section, by activities including—

(1) development of uniform forms and procedures for use in such cases;

(2) notification of foreign reciprocating countries of the State of residence of individuals sought for support enforcement purposes, on the basis of information provided by the Federal Parent Locator Service; and

(3) such other oversight, assistance, and coordination activities as the Secretary may find necessary and appropriate.

(d) Effect on other laws.—States may enter into reciprocal arrangements for the establishment and enforcement of support obligations with foreign countries that are not the subject of a declaration pursuant to subsection (a), to the extent consistent with Federal law.

Sec. 660.—Civil action to enforce child support obligations; jurisdiction of district courts

The district courts of the United States shall have jurisdiction, without regard to any amount in controversy, to hear and determine any civil action certified by the Secretary of Health and Human Services under section 652 (a)(8) of this title. A civil action under this section may be brought in any judicial district in which the claim arose, the plaintiff resides, or the defendant resides.

Sec. 661. Regulations pertaining to garnishments

(a) Authority to promulgate

Authority to promulgate regulations for the implementation of the provisions of section 659 of this title, shall insofar as the provisions of such section are applicable to moneys due from (or payable by)

(1) the executive branch of the Government (including in such branch, for the purposes of this sub-

section, the territories and possessions of the United States, the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, and the government of the District of Columbia), be vested in the President (or his designee),

(2) the legislative branch of the Government, be vested jointly in the President pro tempore of the Senate and the Speaker of the House of Representatives (or their designees), and

(3) the judicial branch of the Government, be vested in the Chief Justice of the United States (or his designee).

(b) Requisite content of promulgated regulations

Regulations promulgated pursuant to this section shall—

(1) in the case of those promulgated by the executive branch of the Government, include a requirement that the head of each agency thereof shall cause to be published, in the appendix of the regulations so promulgated, (A) his designation of an agent or agents to accept service of process, identified by title of position, mailing address, and telephone number, and (B) an indication of the data reasonably required in order for the agency promptly to identify the individual with respect to whose moneys the legal process is brought,

(2) in the case of regulations promulgated for the legislative and judicial branches of the Government set forth, in the appendix to the regulations so promulgated, (A) the name, position, address, and telephone number of the agent or agents who have been designated for service of process, and (B) an indication of the data reasonably required in order for such entity promptly to identify the individual with

respect to whose moneys the legal process is brought, and

(3) provide that (A) in the case of regulations promulgated by the executive branch of the Government, each head of a governmental entity (or his designee) shall respond to relevant interrogatories, if authorized by the law of the State in which legal process will issue, prior to formal issuance of such process, upon a showing of the applicant's entitlement to child support or alimony payments, and (B) in the case of regulations promulgated for the legislative and judicial branches of the Government, the person or persons designated as agents for service of process in accordance with paragraph (2) shall respond to relevant interrogatories if authorized by the law of the State in which legal process will issue, prior to formal issuance of legal process, upon a showing of the applicant's entitlement to child support or alimony payments.

(c) Priority of processes

In the event that a governmental entity, which is authorized under this section or regulations issued to carry out this section to accept service of process, pursuant to the provisions of subsection (a) of this section, is served with more than one legal process with respect to the same moneys due or payable to any individual, then such moneys shall be available to satisfy such processes on a first/come, first/served basis, with any such process being satisfied out of such moneys as remain after the satisfaction of all such processes which have been previously served. **[REPEALED]**

Sec. 662 Definitions

For purposes of section 659 of this title—

(a) The term "United States" means the Federal Government of the United States, consisting of the legislative branch, the judicial branch, and the executive branch thereof, and each and every department, agency, or instrumentality of any such branch, including the United States Postal Service, the Postal Rate Commission, any wholly owned Federal corporation created by an Act of Congress, any office, commission, bureau, or other administrative subdivision or creature thereof, and the governments of the territories and possessions of the United States.

(b) The term "child support", when used in reference to the legal obligations of an individual to provide such support, means periodic payments of funds for the support and maintenance of a child or children with respect to which such individual has such an obligation, and (subject to and in accordance with State law) includes but is not limited to, payments to provide for health care, education, recreation, clothing, or to meet other specific needs of such a child or children; such term also includes attorney's fees, interest, and court costs, when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction.

(c) The term "alimony", when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support;

such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses.

(d) The term "private person" means a person who does not have sovereign or other special immunity or privilege which causes such person not to be subject to legal process.

(e) The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which

(1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country with which the United States has entered into an agreement which requires the United States to honor such process, or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and

(2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

(f) Entitlement of an individual to any money shall be deemed to be "based upon remuneration for employment", if such money consists of—

(1) compensation paid or payable for personal services of such individual, whether such compensation is denominated as wages, salary, commission, bonus, pay, or otherwise, and includes but is not limited to, severance pay, sick pay, and incentive pay, but does not include awards for making suggestions, or

(2) periodic benefits (including a periodic benefit as defined in section 628(h)(3) of this title) or other payments to such individual under the insurance system established by subchapter II of this chapter or any other system or fund established by the United States (as defined in subsection (a) of this section) which provides for the payment of pensions, retirement or retired pay, annuities, dependents' or survivors' benefits, or similar amounts payable on account of personal services performed by himself or any other individual (not including any payment as compensation for death under any Federal program, any payment under any Federal program established to provide "black lung" benefits, any payment by the Secretary of Veterans Affairs as pension, or any payments by the Secretary of Veterans Affairs as compensation for a service/connected disability or death, except any compensation paid by the Secretary of Veterans Affairs to a former member of the Armed Forces who is in receipt of retired or retainer pay if such former member has waived a portion of his retired pay in order to receive such compensation), and does not consist of amounts paid, by way of reimbursement or otherwise, to such individual by his employer to defray expenses incurred by such individual in carrying out duties associated with his employment.

(g) In determining the amount of any moneys due from, or payable by, the United States to any individual, there shall be excluded amounts which—

(1) are owed by such individual to the United States,

(2) are required by law to be, and are, deducted from the remuneration or other payment involved, including but not limited to, Federal employment taxes, and fines and forfeitures ordered by court/martial,

(3) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and if amounts withheld are not greater than would be the case if such individual claimed all dependents to which he was entitled (the withholding of additional amounts pursuant to section 3402(i) of the Internal Revenue Code of 1986 may be permitted only when such individual presents evidence of a tax obligation which supports the additional withholding),

(4) are deducted as health insurance premiums,

(5) are deducted as normal retirement contributions (not including amounts deducted for supplementary coverage), or

(6) are deducted as normal life insurance premiums from salary or other remuneration for employment (not including amounts deducted for supplementary coverage). **[REPEALED]**

Sec. 663. Use of Parent Locator Service in connection with enforcement or determination of child custody in cases of parental kidnaping of child

(a) Agreements with States for use of **Federal** Parent Locator Service

The Secretary shall enter into an agreement with any State which is able and willing to do so, under which the

services of the **Federal** Parent Locator Service established under section 653 of this title shall be made available to such State for the purpose of determining the whereabouts of any *absent* **noncustodial** parent or child when such information is to be used to locate such parent or child for the purpose of—

(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

(2) making or enforcing a child custody determination.

(b) Requests from authorized persons for information

An agreement entered into under subsection (a) of this section shall provide that the State agency described in section 654 of this title will, under procedures prescribed by the Secretary in regulations, receive and transmit to the Secretary requests from authorized persons for information as to (or useful in determining) the whereabouts of any *absent* **noncustodial** parent or child when such information is to be used to locate such parent or child for the purpose of—

(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child; or

(2) making or enforcing a child custody determination.

(c) Information which may be disclosed

Information authorized to be provided by the Secretary under subsection (a), (b), (e), or (f) of this section shall be subject to the same conditions with respect to disclosure as information authorized to be provided under section 653 of this title, and a request for information by the Secretary under this section shall be considered to be a request for information under section 653 of this title which is authorized to be provided under such section.

Only information as to the most recent address and place of employment of any *absent* **noncustodial** parent or child shall be provided under this section.

(d) "Custody determination" and "authorized person" defined

For purposes of this section—

(1) the term "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modification;

(2) the term "authorized person" means—

(A) any agent or attorney of any State having an agreement under this section, who has the duty or authority under the law of such State to enforce a child custody determination;

(B) any court having jurisdiction to make or enforce such a child custody determination, or any agent of such court; and

(C) any agent or attorney of the United States, or of a State having an agreement under this section, who has the duty or authority to investigate, enforce, or bring a prosecution with respect to the unlawful taking or restraint of a child.

(e) Agreement on use of **Federal** Parent Locator Service with United States Central Authority under Convention on the Civil Aspects of International Child Abduction

The Secretary shall enter into an agreement with the Central Authority designated by the President in accordance with section 11606 of this title, under which the services of the **Federal** Parent Locator Service established under section 653 of this title shall be made available to such Central Authority upon its request for the purpose of locating any parent or child on behalf of an appli-

cant to such Central Authority within the meaning of section 11602(1) of this title. The **Federal** Parent Locator Service shall charge no fees for services requested pursuant to this subsection.

(f) Agreement to assist in locating missing children under **Federal** Parent Locator Service

The Secretary shall enter into an agreement with the Attorney General of the United States, under which the services of the **Federal** Parent Locator Service established under section 653 of this title shall be made available to the Office of Juvenile Justice and Delinquency Prevention upon its request to locate any parent or child on behalf of such Office for the purpose of—

(1) enforcing any State or Federal law with respect to the unlawful taking or restraint of a child, or

(2) making or enforcing a child custody determination.

The **Federal** Parent Locator Service shall charge no fees for services requested pursuant to this subsection.

Sec. 664. Collection of past-due support from Federal tax refunds

(a) Procedures applicable; distribution

(1) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 602 (a)(26) or section 671(a)(17) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-

due support, shall concurrently send notice to such individual that the withholding has been made (including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund), and shall pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with *section 657(b)(4) or (d)(3)* **section 657** of this title.

(2)(A) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support (as that term is defined for purposes of this paragraph under subsection (c) of this section) which such State has agreed to collect under section 654(6) of this title, and that the State agency has sent notice to such individual in accordance with paragraph (3)(A), the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to such past-due support, and shall concurrently send notice to such individual that the withholding has been made, including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund. The Secretary of the Treasury shall pay the amount withheld to the State agency, and the State shall pay to the Secretary of the Treasury any fee imposed by the Secretary of the Treasury to cover the costs of the withholding and any required notification. The State

agency shall, subject to paragraph (3)(B), distribute such amount to or on behalf of the child to whom the support was owed.

(B) This paragraph shall apply only with respect to refunds payable under section 6402 of the Internal Revenue Code of 1986 after December 31, 1985.

(3)(A) Prior to notifying the Secretary of the Treasury under paragraph (1) or (2) that an individual owes past-due support, the State shall send notice to such individual that a withholding will be made from any refund otherwise payable to such individual. The notice shall also (i) instruct the individual owing the past-due support of the steps which may be taken to contest the State's determination that past-due support is owed or the amount of the past-due support, and (ii) provide information, as may be prescribed by the Secretary of Health and Human Services by regulation in consultation with the Secretary of the Treasury, with respect to procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

(B) If the Secretary of the Treasury determines that an amount should be withheld under paragraph (1) or (2), and that the refund from which it should be withheld is based upon a joint return, the Secretary of the Treasury shall notify the State that the withholding is being made from a refund based upon a joint return, and shall furnish to the State the names and addresses of each taxpayer filing such joint return.

In the case of a withholding under paragraph (2), the State may delay distribution of the amount withheld until the State has been notified by the Secretary of the Treasury that the other person filing the

joint return has received his or her proper share of the refund, but such delay may not exceed six months.

(C) If the other person filing the joint return with the named individual owing the past-due support takes appropriate action to secure his or her proper share of a refund from which a withholding was made under paragraph (1) or (2), the Secretary of the Treasury shall pay such share to such other person. The Secretary of the Treasury shall deduct the amount of such payment from amounts subsequently payable to the State agency to which the amount originally withheld from such refund was paid.

(D) In any case in which an amount was withheld under paragraph (1) or (2) and paid to a State, and the State subsequently determines that the amount certified as past-due support was in excess of the amount actually owed at the time the amount withheld is to be distributed to or on behalf of the child, the State shall pay the excess amount withheld to the named individual thought to have owed the past-due support (or, in the case of amounts withheld on the basis of a joint return, jointly to the parties filing such return).

(b) Regulations; contents, etc.

(1) The Secretary of the Treasury shall issue regulations, approved by the Secretary of Health and Human Services, prescribing the time or times at which States must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall be consistent with the provisions of subsection (a)(3) of this section, shall specify the minimum

amount of past-due support to which the offset procedure established by subsection (a) of this section may be applied, and the fee that a State must pay to reimburse the Secretary of the Treasury for the full cost of applying the offset procedure, and shall provide that the Secretary of the Treasury will advise the Secretary of Health and Human Services, not less frequently than annually, of the States which have furnished notices of past-due support under subsection (a) of this section, the number of cases in each State with respect to which such notices have been furnished, the amount of support sought to be collected under this subsection by each State, and the amount of such collections actually made in the case of each State. Any fee paid to the Secretary of the Treasury pursuant to this subsection may be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

(2) In the case of withholdings made under subsection (a)(2) of this section, the regulations promulgated pursuant to this subsection shall include the following requirements:

(A) The withholding shall apply only in the case where the State determines that the amount of the past-due support which will be owed at the time the withholding is to be made, based upon the pattern of payment of support and other enforcement actions being pursued to collect the past-due support, is equal to or greater than $500. The State may limit the $500 threshold amount to amounts of past-due support accrued since the time that the State first began to enforce the child support order involved under the State plan, and may limit the application of the withholding to past-due support accrued since such time.

(B) The fee which the Secretary of the Treasury may impose to cover the costs of the withholding and notification may not exceed $25 per case submitted.

(c) "Past-due support" defined

(1) Except as provided in paragraph (2), as used in this part the term "past-due support" means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living.

(2) For purposes of subsection (a)(2) of this section, the term "past-due support" means only past-due support owed to or on behalf of a qualified child (or a qualified child and the parent with whom the child is living if the same support order includes support for the child and the parent).

(3) For purposes of paragraph (2), the term "qualified child" means a child—

(A) who is a minor; or

(B)(i) who, while a minor, was determined to be disabled under subchapter II or XVI of this chapter; and

(ii) for whom an order of support is in force.

Sec. 665. Allotments from pay for child and spousal support owed by members of uniformed services on active duty

(a) Mandatory allotment; notice upon failure to make; amount of allotment; adjustment or discontinuance; consultation

(1) In any case in which child support payments or child and spousal support payments are owed by a member of one of the uniformed services (as defined in section 101(3) of title 37) on active duty,

such member shall be required to make allotments from his pay and allowances (under chapter 13 of title 37) as payment of such support, when he has failed to make periodic payments under a support order that meets the criteria specified in section 1673(b)(1)(A) of title 15 and the resulting delinquency in such payments is in a total amount equal to the support payable for two months or longer. Failure to make such payments shall be established by notice from an authorized person (as defined in subsection (b) of this section) to the designated official in the appropriate uniformed service. Such notice (which shall in turn be given to the affected member) shall also specify the person to whom the allotment is to be payable. The amount of the allotment shall be the amount necessary to comply with the order (which, if the order so provides, may include arrearages as well as amounts for current support), except that the amount of the allotment, together with any other amounts withheld for support from the wages of the member, as a percentage of his pay from the uniformed service, shall not exceed the limits prescribed in sections 1673(b) and (c) of title 15. An allotment under this subsection shall be adjusted or discontinued upon notice from the authorized person.

(2) Notwithstanding the preceding provisions of this subsection, no action shall be taken to require an allotment from the pay and allowances of any member of one of the uniformed services under such provisions (A) until such member has had a consultation with a judge advocate of the service involved (as defined in section 801(13) of title 10), or with a law specialist (as defined in section 801(11) of such title) in the case of the Coast Guard, or with a legal officer designated by the Secretary concerned (as defined in section 101(5) of title 37) in any

other case, in person, to discuss the legal and other factors involved with respect to the member's support obligation and his failure to make payments thereon, or (B) until 30 days have elapsed after the notice described in the second sentence of paragraph (1) is given to the affected member in any case where it has not been possible, despite continuing good faith efforts, to arrange such a consultation.

(b) "Authorized person" defined

For purposes of this section the term "authorized person" with respect to any member of the uniformed services means—

(1) any agent or attorney of a State having in effect a plan approved under this part who has the duty or authority under such plan to seek to recover any amounts owed by such member as child or child and spousal support (including, when authorized under the State plan, any official of a political subdivision); and

(2) the court which has authority to issue an order against such member for the support and maintenance of a child, or any agent of such court.

(c) Regulations

The Secretary of Defense, in the case of the Army, Navy, Air Force, and Marine Corps, and the Secretary concerned (as defined in section 101(5) of title 37) in the case of each of the other uniformed services, shall each issue regulations applicable to allotments to be made under this section, designating the officials to whom notice of failure to make support payments, or notice to discontinue or adjust an allotment, should be given, prescribing the form and content of the notice and specifying any other rules necessary for such Secretary to implement this section.

Sec. 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

(a) Types of procedures required

In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

(1) Procedures described in subsection (b) of this section for the withholding from income of amounts payable as support.

(1)(A) Procedures described in subsection (b) for the withholding from income of amounts payable as support in cases subject to enforcement under the State plan.

(B) Procedures under which the income of a person with a support obligation imposed by a support order issued (or modified) in the State before October 1, 1996, if not otherwise subject to withholding under subsection (b), shall become subject to withholding as provided in subsection (b) if arrearages occur, without the need for a judicial or administrative hearing.

(2) *Procedures under which expedited processes (determined in accordance with regulations of the Secretary) are in effect under the State judicial system or under State administrative processes (A) for obtaining and enforcing support orders, and (B) for establishing paternity.* **Expedited administrative and judicial procedures (including the procedures specified in subsection (c)) for establishing paternity and for establishing, modifying, and enforcing support obligations.** The Secretary may waive the provi-

sions of this paragraph with respect to one or more political subdivisions within the State on the basis of the effectiveness and timeliness of support order issuance and enforcement or paternity establishment within the political subdivision (in accordance with the general rule for exemptions under subsection (d) of this section).

(3) Procedures under which the State child support enforcement agency shall request, and the State shall provide, that for the purpose of enforcing a support order under any State plan approved under this part—

(A) any refund of State income tax which would otherwise be payable to *an absent* **a noncustodial** parent will be reduced, after notice has been sent to that *absent* **noncustodial** parent of the proposed reduction and the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State), by the amount of any overdue support owed by such *absent* **noncustodial** parent;

(B) the amount by which such refund is reduced shall be distributed in accordance with section 657(b)(4) or (d)(3) of this title in the case of overdue support assigned to a State pursuant to section *602(a)(26)* **608(a)(3)** or 671(a)(17) of this title, or, *in the case of overdue support which a State has agreed to collect under section 654(6)* **in any other case** of this title, shall be distributed, after deduction of any fees imposed by the State to cover the costs of collection, to the child or parent to whom such support is owed; and

(C) notice of the *absent* **noncustodial** parent's social security account number (or numbers, if he has more than one such number)

and home address shall be furnished to the State agency requesting the refund offset, and to the State agency enforcing the order.

(4) Procedures under which liens are imposed against real and personal property for amounts of overdue support owed by an absent parent who resides or owns property in the State.

(4) Liens.—Procedures under which—

(A) liens arise by operation of law against real and personal property for amounts of overdue support owed by a noncustodial parent who resides or owns property in the State; and

(B) the State accords full faith and credit to liens described in subparagraph (A) arising in another State, when the State agency, party, or other entity seeking to enforce such a lien complies with the procedural rules relating to recording or serving liens that arise within the State, except that such rules may not require judicial notice or hearing prior to the enforcement of such a lien.

(5)(A)(i) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

(ii) As of August 16, 1984, the requirement of clause (i) shall also apply to any child for whom paternity has not yet been established and any child for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State.

(B) Procedures under which the State is required (except in cases where the individual involved has been found under section 602(a)(26)(B) of this title to have good cause for refusing to cooperate) to require the child and all other parties, in a contested paternity case, to submit to genetic tests upon the request of any such party.

(C) Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that the rights and responsibilities of acknowledging paternity are explained and ensure that due process safeguards are afforded. Such procedures must include a hospital/based program for the voluntary acknowledgment of paternity during the period immediately before or after the birth of a child.

(D) Procedures under which the voluntary acknowledgment of paternity creates a rebuttable, or at the option of the State, conclusive presumption of paternity, and under which such voluntary acknowledgment is admissible as evidence of paternity.

(E) Procedures under which the voluntary acknowledgment of paternity must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity.

(F) Procedures which provide that (i) any objection to genetic testing results must be made in writing within a specified number of days before any hearing at which such results may be introduced into evidence, and (ii) if no objection is made, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy.

(G) Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

(H) Procedures requiring a default order to be entered in a paternity case upon a showing of service of process on the defendant and any additional showing required by State law.

(5) Procedures concerning paternity establishment.—

(A) Establishment process available from birth until age 18.—

(i) Procedures which permit the establishment of the paternity of a child at any time before the child attains 18 years of age.

(ii) As of August 16, 1984, clause (i) shall also apply to a child for whom paternity has not been established or for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State.

(B) Procedures concerning genetic testing.—

(i) Genetic testing required in certain contested cases.—Procedures under which the State is required, in a contested paternity case (unless otherwise barred by State law) to require the child and all other parties (other than individuals found under section 654(29) to have good cause and other exceptions for refusing to cooperate) to submit to genetic tests upon the request

of any such party, if the request is supported by a sworn statement by the party—

(I) alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or

(II) denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties.

(ii) Other requirements. — Procedures which require the State agency, in any case in which the agency orders genetic testing—

(I) to pay costs of such tests, subject to recoupment (if the State so elects) from the alleged father if paternity is established; and

(II) to obtain additional testing in any case if an original test result is contested, upon request and advance payment by the contestant.

(C) Voluntary paternity acknowledgment.—

(i) Simple civil process.—Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and a putative father can sign an acknowledgment of paternity, the mother and the putative father must be given notice, orally and in writing, of the alternatives to, the legal consequences of, and the rights (including, if 1 parent is a minor, any rights afforded due to minority status) and responsibilities that arise from, signing the acknowledgment.

(ii) Hospital-based program.—Such procedures must include a hospital-based program for the voluntary acknowledgment of paternity focusing on the period immediately before or after the birth of a child.

(iii) Paternity establishment services.—

(I) State-offered services. — Such procedures must require the State agency responsible for maintaining birth records to offer voluntary paternity establishment services.

(II) Regulations.—

(aa) Services offered by hospitals and birth record agencies.—The Secretary shall prescribe regulations governing voluntary paternity establishment services offered by hospitals and birth record agencies.

(bb) Services offered by other entities.—The Secretary shall prescribe regulations specifying the types of other entities that may offer voluntary paternity establishment services, and governing the provision of such services which shall include a requirement that such an entity must use the same notice provisions used by, use the same materials used by, provide the personnel providing such services with the same training provided by, and evaluate the provision of such services in the same manner as the provision of such services is evaluated by, voluntary paternity establishment

programs of hospitals and birth record agencies.

(iv) Use of paternity acknowledgment affidavit.—Such procedures must require the State to develop and use an affidavit for the voluntary acknowledgment of paternity which includes the minimum requirements of the affidavit specified by the Secretary under section 652(a)(7) for the voluntary acknowledgment of paternity, and to give full faith and credit to such an affidavit signed in any other State according to its procedures.

(D) Status of signed paternity acknowledgment.—

(i) Inclusion in birth records.—Procedures under which the name of the father shall be included on the record of birth of the child of unmarried parents only if—

(I) the father and mother have signed a voluntary acknowledgment of paternity; or

(II) a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity.

Nothing in this clause shall preclude a State agency from obtaining an admission of paternity from the father for submission in a judicial or administrative proceeding, or prohibit the issuance of an order in a judicial or administrative proceeding which bases a legal finding of paternity on an admission of paternity by the father and any other additional showing required by State law.

(ii) Legal finding of paternity.—Procedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of—

(I) 60 days; or

(II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.

(iii) Contest.—Procedures under which, after the 60-day period referred to in clause (ii), a signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger, and under which the legal responsibilities (including child support obligations) of any signatory arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

(E) Bar on acknowledgment ratification proceedings.—Procedures under which judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity.

(F) Admissibility of genetic testing results.—Procedures—

(i) requiring the admission into evidence, for purposes of establishing paternity, of the results of any genetic test that is—

(I) of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary; and

(II) performed by a laboratory approved by such an accreditation body;

(ii) requiring an objection to genetic testing results to be made in writing not later than a specified number of days before any hearing at which the results may be introduced into evidence (or, at State option, not later than a specified number of days after receipt of the results); and

(iii) making the test results admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made.

(G) Presumption of paternity in certain cases.—Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

(H) Default orders.—Procedures requiring a default order to be entered in a paternity case upon a showing of service of process on the defendant and any additional showing required by State law.

(I) No right to jury trial.—Procedures providing that the parties to an action to establish paternity are not entitled to a trial by jury.

(J) Temporary support order based on probable paternity in contested cases.—Procedures which require that a temporary order be issued, upon motion by a party, requiring the provision of child support pending an administrative or

judicial determination of parentage, if there is clear and convincing evidence of paternity (on the basis of genetic tests or other evidence).

(K) Proof of certain support and paternity establishment costs.—Procedures under which bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

(L) Standing of putative fathers.—Procedures ensuring that the putative father has a reasonable opportunity to initiate a paternity action.

(M) Filing of acknowledgments and adjudications in State registry of birth records.—Procedures under which voluntary acknowledgments and adjudications of paternity by judicial or administrative processes are filed with the State registry of birth records for comparison with information in the State case registry.

(6) Procedures which require that *an absent* **a noncustodial** parent give security, post a bond, or give some other guarantee to secure payment of overdue support, after notice has been sent to such *absent* **noncustodial** parent of the proposed action and of the procedures to be followed to contest it (and after full compliance with all procedural due process requirements of the State).

(7) Procedures which require the State to periodically report to consumer reporting agencies (as defined in section 1681a(f) of title 15) the name of any parent who owes overdue support and is at least 2 months delinquent in the payment of such support and the amount of such delinquency; except that (A) if the amount of the overdue support involved in any case is less than $1,000, information regarding such amount shall be made available only at the option of the State, (B) any information with respect to an absent parent shall be made available under such procedures only after notice has been sent to such absent parent of the proposed action, and such absent parent has been given a reasonable opportunity to contest the accuracy of such information (and after full compliance with all procedural due process requirements of the State), and (C) **such** *information shall not be made available to (i) a consumer reporting agency which the State determines does not have sufficient capacity to systematically and timely make accurate use of such information, or (ii) an entity which has not furnished evidence satisfactory to the State that the entity is a consumer reporting agency.*

(7) Reporting arrearages to credit bureaus.—

(A) In general.—Procedures (subject to safeguards pursuant to subparagraph (B)) requiring the State to report periodically to consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) the name of any noncustodial parent who is delinquent in the payment of support, and the amount of overdue support owed by such parent.

(B) Safeguards.—Procedures ensuring that, in carrying out subparagraph (A), information with respect to a noncustodial parent is reported—

(i) only after such parent has been afforded all due process required under State law, including notice and a reasonable opportunity to contest the accuracy of such information; and

(ii) only to an entity that has furnished evidence satisfactory to the State that the entity is a consumer reporting agency (as so defined).

(8)(A) Procedures under which all child support orders not described in subparagraph (B) will include provision for withholding from *wages* **income,** in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part.

(B) Procedures under which all child support orders which are initially issued in the State on or after January 1, 1994, and are not being enforced under this part will include the following requirements:

(i) The *wages* **income** of *an absent* **a noncustodial** parent shall be subject to withholding, regardless of whether support payments by such parents are in arrears, on the effective date of the order; except that such *wages* **income** shall not be subject to withholding under this clause in any case where (I) one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding, or (II) a written agreement is reached between both parties which provides for an alternative arrangement.

(ii) The requirements of subsection (b)(1) of this section (which shall apply in the case of each *absent* **noncustodial**

parent against whom a support order is or has been issued or modified in the State, without regard to whether the order is being enforced under the State plan).

(iii) The requirements of paragraphs (2), (5), (6), (7), (8), (9), and (10) of subsection (b) of this section, where applicable.

(iv) Withholding from income of amounts payable as support must be carried out in full compliance with all procedural due process requirements of the State.

(9) Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due)—

(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced.

(B) entitled as a judgment to full faith and credit in such State and in any other State, and

(C) not subject to retroactive modification by such State or by any other State; except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor.

(10)(A) Procedures to ensure that, beginning 2 years after October 13, 1988, if the State determines (pursuant to a plan indicating how and when child

support orders in effect in the State are to be periodically reviewed and adjusted) that a child support order being enforced under this part should be reviewed, the State must, at the request of either parent subject to the order, or of a State child support enforcement agency, initiate a review of such order, and adjust such order, as appropriate, in accordance with the guidelines established pursuant to section 667(a) of this title.

(B) Procedures to ensure that, beginning 5 years after October 13, 1988, or such earlier date as the State may select, the State must implement a process for the periodic review and adjustment of child support orders being enforced under this part under which the order is to be reviewed not later than 36 months after the establishment of the order or the most recent review, and adjusted, as appropriate, in accordance with the guidelines established pursuant to section 667(a) of this title, unless

(i) in the case of an order with respect to an individual with respect to whom an assignment under section 602(a)(26) of this title is in effect, the State has determined, in accordance with regulations of the Secretary, that such a review would not be in the best interests of the child and neither parent has requested review; and

(ii) in the case of any other order being enforced under this part, neither parent has requested review.

(C) Procedures to ensure that the State notifies each parent subject to a child support order in effect in the State that is being enforced under this part

(i) of any review of such order, at least 30 days before the commencement of such review; and

(ii) of the right of such parent under subparagraph (B) to request the State to review such order; and

(iii) of a proposed adjustment (or determination that there should be no change) in the child support award amount, and such parent is afforded not less than 30 days after such notification to initiate proceedings to challenge such adjustment (or determination).

(10) Review and adjustment of support orders upon request.—

(A) 3-Year cycle.—

(i) In general.—Procedures under which every 3 years (or such shorter cycle as the State may determine), upon the request of either parent, or, if there is an assignment under part A, upon the request of the State agency under the State plan or of either parent, the State shall with respect to a support order being enforced under this part, taking into account the best interests of the child involved—

(I) review and, if appropriate, adjust the order in accordance with the guidelines established pursuant to section 667(a) if the amount of the child support award under the order differs from the amount that would be awarded in accordance with the guidelines;

(II) apply a cost-of-living adjustment to the order in accordance with a formula developed by the State; or

(III) use automated methods (including automated comparisons with wage or State income tax data) to identify orders eligible for review, conduct the review, identify orders eligible for adjustment, and apply the appropriate adjustment to the orders eligible for adjustment under any threshold that may be established by the State.

(ii) Opportunity to request review of adjustment.—If the State elects to conduct the review under subclause (II) or (III) of clause (i), procedures which permit either party to contest the adjustment, within 30 days after the date of the notice of the adjustment, by making a request for review and, if appropriate, adjustment of the order in accordance with the child support guidelines established pursuant to section 667(a).

(iii) No proof of change in circumstances necessary in 3-year cycle review.—Procedures which provide that any adjustment under clause (i) shall be made without a requirement for proof or showing of a change in circumstances.

(B) Proof of substantial change in circumstances necessary in request for review outside 3-year cycle.—Procedures under which, in the case of a request for a review, and if appropriate, an adjustment outside the 3-year cycle (or such shorter cycle as the State may determine) under clause (i), the State shall review and, if the requesting party demonstrates a substantial change in circumstances, adjust the

order in accordance with the guidelines established pursuant to section 667(a).

(C) Notice of right to review.—Procedures which require the State to provide notice not less than once every 3 years to the parents subject to the order informing the parents of their right to request the State to review and, if appropriate, adjust the order pursuant to this paragraph. The notice may be included in the order.

(11) Procedures under which a State must give full faith and credit to a determination of paternity made by any other State, whether established through voluntary acknowledgment or through administrative or judicial processes.

(12) Locator information from interstate networks.—Procedures to ensure that all Federal and State agencies conducting activities under this part have access to any system used by the State to locate an individual for purposes relating to motor vehicles or law enforcement.

(13) Recording of social security numbers in certain family matters.—Procedures requiring that the social security number of—

(A) any applicant for a professional license, commercial driver's license, occupational license, or marriage license be recorded on the application;

(B) any individual who is subject to a divorce decree, support order, or paternity determination or acknowledgment be placed in the records relating to the matter; and

(C) any individual who has died be placed in the records relating to the death and be recorded on the death certificate.

For purposes of subparagraph (A), if a State allows the use of a number other than the social security number, the State shall so advise any applicants.

(14) Administrative enforcement in interstate cases.—Procedures under which—

(A)(i) the State shall respond within 5 business days to a request made by another State to enforce a support order; and

(ii) the term 'business day' means a day on which State offices are open for regular business;

(B) the State may, by electronic or other means, transmit to another State a request for assistance in a case involving the enforcement of a support order, which request—

(i) shall include such information as will enable the State to which the request is transmitted to compare the information about the case to the information in the data bases of the State; and

(ii) shall constitute a certification by the requesting State—

(I) of the amount of support under the order the payment of which is in arrears; and

(II) that the requesting State has complied with all procedural due process requirements applicable to the case;

(C) if the State provides assistance to another State pursuant to this paragraph with respect to a case, neither State shall consider the case to be transferred to the caseload of such other States; and

(D) the State shall maintain records of—

(i) the number of such requests for assistance received by the State;

(ii) the number of cases for which the State collected support in response to such a request; and

(iii) the amount of such collected support.

(15) Procedures to ensure that persons owing past-due support work or have a plan for payment of such support.—

(A) In general.—Procedures under which the State has the authority, in any case in which an individual owes past-due support with respect to a child receiving assistance under a State program funded under part A, to issue an order or to request that a court or an administrative process established pursuant to State law issue an order that requires the individual to—

(i) pay such support in accordance with a plan approved by the court, or, at the option of the State, a plan approved by the State agency administering the State program under this part; or

(ii) if the individual is subject to such a plan and is not incapacitated, participate in such work activities (as defined in section 607(d)) as the court, or, at the option of the State, the State agency administering the State program under this part, deems appropriate.

(B) Past-due support defined.—For purposes of subparagraph (A), the term 'past-due support' means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living.

(16) Authority to withhold or suspend licenses.—Procedures under which the State has (and uses in appropriate cases) authority to withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings.

(17) Financial institution data matches.—

(A) In general.—Procedures under which the State agency shall enter into agreements with financial institutions doing business in the State—

(i) to develop and operate, in coordination with such financial institutions, a data match system, using automated data exchanges to the maximum extent feasible, in which each such financial institution is required to provide for each calendar quarter the name, record address, social security number or other taxpayer identification number, and other identifying information for each noncustodial parent who maintains an account at such institution and who owes past-due support, as identified by the State by name and social security number or other taxpayer identification number; and

(ii) in response to a notice of lien or levy, encumber or surrender, as the case may be, assets held by such institution on behalf of any noncustodial parent who is subject to a child support lien pursuant to paragraph (4).

(B) Reasonable fees.—The State agency may pay a reasonable fee to a financial institution

for conducting the data match provided for in subparagraph (A)(i), not to exceed the actual costs incurred by such financial institution.

(C) Liability.—A financial institution shall not be liable under any Federal or State law to any person—

(i) for any disclosure of information to the State agency under subparagraph (A)(i);

(ii) for encumbering or surrendering any assets held by such financial institution in response to a notice of lien or levy issued by the State agency as provided for in subparagraph (A)(ii); or

(iii) for any other action taken in good faith to comply with the requirements of subparagraph (A).

(D) Definitions.—For purposes of this paragraph—

(i) Financial institution.—The term 'financial institution' has the meaning given to such term by section 669A(d)(1).

(ii) Account.—The term 'account' means a demand deposit account, checking or negotiable withdrawal order account, savings account, time deposit account, or money-market mutual fund account.

(18) Enforcement of orders against paternal or maternal grandparents.—Procedures under which, at the State's option, any child support order enforced under this part with respect to a child of minor parents, if the custodial parent of such child is receiving assistance under the State program under part A, shall be enforceable, jointly and severally, against the parents of the noncustodial parent of such child.

(19) Health care coverage.—Procedures under which all child support orders enforced pursuant to this part shall include a provision for the health care coverage of the child, and in the case in which a noncustodial parent provides such coverage and changes employment, and the new employer provides health care coverage, the State agency shall transfer notice of the provision to the employer, which notice shall operate to enroll the child in the noncustodial parent's health plan, unless the noncustodial parent contests the notice.

Notwithstanding section 654(20)(B) of this title, the procedures which are required under paragraphs (3), (4), (6), *and (7)***(7), and (15)** need not be used or applied in cases where the State determines (using guidelines which are generally available within the State and which take into account the payment record of the *absent* **noncustodial** parent, the availability of other remedies, and other relevant considerations) that such use or application would not carry out the purposes of this part or would be otherwise inappropriate in the circumstances.

(b) Withholding from income of amounts payable as support

The procedures referred to in *subsection (a)(1)* **subsection (a)(1)(A)** of this section (relating to the withholding from income of amounts payable as support) must provide for the following:

(1) In the case of each *absent* **noncustodial** parent against whom a support order is or has been issued or modified in the State, and is being enforced under the State plan, so much of such parent's *wages (as defined by the State for purposes of this section)* **income** must be withheld, in accordance with the succeeding provisions of this subsection, as is necessary to comply with the order and provide for the payment of any fee to the employer which may be

required under paragraph (6)(A), up to the maximum amount permitted under section 1673(b) of title 15. If there are arrearages to be collected, amounts withheld to satisfy such arrearages, when added to the amounts withheld to pay current support and provide for the fee, may not exceed the limit permitted under such section 1673(b), but the State need not withhold up to the maximum amount permitted under such section in order to satisfy arrearages.

(2) Such withholding must be provided without the necessity of any application therefor in the case of a child (whether or not eligible for *aid* **assistance under a State program funded** under part A of this subchapter) with respect to whom services are already being provided under the State plan under this part, and must be provided in accordance with this subsection on the basis of an application for services under the State plan in the case of any other child in whose behalf a support order has been issued or modified in the State. In either case such withholding must occur without the need for any amendment to the support order involved or for any further action (other than those actions required under this part) by the court or other entity which issued such order.

(3)(A) The *wages* **income** of *an absent* **a noncustodial** parent shall be subject to such withholding, regardless of whether support payments by such parents are in arrears, in the case of a support order being enforced under this part that is issued or modified on or after the first day of the 25th month beginning after October 13, 1988, on the effective date of the order; except that such *wages* **income** shall not be subject to such withholding under this subparagraph in any case where (i) one of the parties demonstrates, and the court (or administrative proc-

ess) finds, that there is good cause not to require immediate income withholding, or (ii) a written agreement is reached between both parties which provides for an alternative arrangement.

(B) The *wages* **income** of *an absent* **a noncustodial** parent shall become subject to such withholding, in the case of *wages* **income** not subject to withholding under subparagraph (A), on the date on which the payments which the *absent* **noncustodial** parent has failed to make under a support order are at least equal to the support payable for one month or, if earlier, and without regard to whether there is an arrearage, the earliest of—

(i) the date as of which the *absent* **noncustodial** parent requests that such withholding begin,

(ii) the date as of which the custodial parent requests that such withholding begin, if the State determines, in accordance with such procedures and standards as it may establish, that the request should be approved, or

(iii) such earlier date as the State may select.

(4)(A) Such withholding must be carried out in full compliance with all procedural due process requirements of the State, and (subject to subparagraph (B)) the State must send advance notice to each absent parent to whom paragraph (1) applies regarding the proposed withholding and the procedures such absent parent should follow if he or she desires to contest such withholding on the grounds that withholding (including the amount to be withheld) is not proper in the case involved because of mistakes of

fact. If the absent parent contests such withholding on those grounds, the State shall determine whether such withholding will actually occur, shall (within no more than 45 days after the provision of such advance notice) inform such parent of whether or not withholding will occur and (if so) of the date on which it is to begin, and shall furnish such parent with the information contained in any notice given to the employer under paragraph (6)(A) with respect to such withholding.

(B) The requirement of advance notice set forth in the first sentence of subparagraph (A) shall not apply in the case of any State which has a system of income withholding for child support purposes in effect on August 16, 1984, if such system provides on that date, and continues to provide, such procedures as may be necessary to meet the procedural due process requirements of State law.

(4)(A) Such withholding must be carried out in full compliance with all procedural due process requirements of the State, and the State must send notice to each noncustodial parent to whom paragraph (1) applies—

(i) that the withholding has commenced; and

(ii) of the procedures to follow if the noncustodial parent desires to contest such withholding on the grounds that the withholding or the amount withheld is improper due to a mistake of fact.

(B) The notice under subparagraph (A) of this paragraph shall include the information provided to the employer under paragraph (6)(A).

(5) Such withholding must be administered by *a public agency designated by the State, and the amounts withheld must be expeditiously distributed by the State or such agency in accordance with section 657 of this title under procedures (specified by the State) adequate to document payments of support and to track and monitor such payments, except that the State may establish or permit the establishment of alternative procedures for the collection and distribution of such amounts (under the supervision of such public agency) otherwise than through such public agency so long as the entity making such collection and distribution is publicly accountable for its actions taken in carrying out such procedures, and so long as such procedures will assure prompt distribution, provide for the keeping of adequate records to document payments of support, and permit the tracking and monitoring of such payments* **the State through the State disbursement unit established pursuant to section 654B, in accordance with the requirements of section 654B.**

(6)(A)(i) The employer of any *absent* **noncustodial** parent to whom paragraph (1) applies, upon being given notice as described in clause (ii), must be required to withhold from such *absent* **noncustodial** parent's *wages* **income** the amount specified by such notice (which may include a fee, established by the State, to be paid to the employer unless waived by such employer) and pay such amount (after deducting and retaining any portion thereof which represents the fee so established) *to the appropriate agency (or other entity authorized to collect the amounts withheld under the alternative procedures described in paragraph (5)) for distribution in accordance with section 657 of this title* **to the State disbursement unit within 7 business days after the date the amount would (but for this subsection) have been paid or credited to the employee, for distribution in accordance with this part. The employer shall withhold funds as directed in the notice, except that when an employer receives an income withholding order issued by another State, the employer shall apply the income withholding law of the state of the obligor's principal place of employment in determining—**

(I) the employer's fee for processing an income withholding order;

(II) the maximum amount permitted to be withheld from the obligor's income;

(III) the time periods within which the employer must implement the income withholding order and forward the child support payment;

(IV) the priorities for withholding and allocating income withheld for multiple child support obligees; and

(V) any withholding terms or conditions not specified in the order.

An employer who complies with an income withholding notice that is regular on its face shall not be subject to civil liability to any individual or agency for conduct in compliance with the notice.

(ii) The notice given to the employer shall **be in a standard format prescribed by the Secretary, and** contain only such information as may be necessary for the employer to comply with the withholding order.

(iii) As used in this subparagraph, the term 'business day' means a day on which State offices are open for regular business.

(B) Methods must be established by the State to simplify the withholding process for

employers to the greatest extent possible, including permitting any employer to combine all withheld amounts into a single payment to each appropriate agency or entity (with the portion thereof which is attributable to each individual employee being separately designated).

(C) The employer must be held liable to the State for any amount which such employer fails to withhold from *wages* **income** due an employee following receipt by such employer of proper notice under subparagraph (A), but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph.

(D) Provision must be made for the imposition of a fine against *any employer who discharges from employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer.* **any employer who—**

(i) discharges from employment, refuses to employ, or takes disciplinary action against any noncustodial parent subject to income withholding required by this subsection because of the existence of such withholding and the obligations or additional obligations which it imposes upon the employer; or

(ii) fails to withhold support from income or to pay such amounts to the State disbursement unit in accordance with this subsection.

(7) Support collection under this subsection must be given priority over any other legal process under State law against the same *wages* **income**.

(8) The State may take such actions as may be necessary to extend its system of withholding under this subsection so that such system will include withholding from forms of income other than wages, in order to assure that child support owed by absent parents in the State will be collected without regard to the types of such absent parents' income or the nature of their income-producing activities.

(8) For purposes of subsection (a) and this subsection, the term 'income' means any periodic form of payment due to an individual, regardless of source, including wages, salaries, commissions, bonuses, worker's compensation, disability, payments pursuant to a pension or retirement program, and interest.

(9) The State must extend its withholding system under this subsection so that such system will include withholding from income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by *absent* **noncustodial** parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or of such child's custodial parent.

(10) Provision must be made for terminating withholding.

(11) Procedures under which the agency administering the State plan approved under this part may execute a withholding order without advance notice to the obligor, including issuing the withholding order through electronic means.

(c) Administration of support payments through State agency or other entity

Any State may at its option, under its plan approved under section 654 of this title, establish procedures under which support payments under this part will be made through the State agency or other entity which administers the State's income withholding system in any case where either the absent parent or the custodial parent requests it, even though no arrearages in child support payments are involved and no income withholding procedures have been instituted; but in any such case an annual fee for handling and processing such payments, in an amount not exceeding the actual costs incurred by the State in connection therewith or $25, whichever is less, shall be imposed on the requesting parent by the State. **[REPEALED]**

(c) Expedited procedures.—The procedures specified in this subsection are the following:

(1) Administrative action by State agency.—Procedures which give the State agency the authority to take the following actions relating to establishment of paternity or to establishment, modification, or enforcement of support orders, without the necessity of obtaining an order from any other judicial or administrative tribunal, and to recognize and enforce the authority of State agencies of other States to take the following actions:

(A) Genetic testing.—To order genetic testing for the purpose of paternity establishment as provided in section 666(a)(5).

(B) Financial or other information.—To subpoena any financial or other information needed to establish, modify, or enforce a support order, and to impose penalties for failure to respond to such a subpoena.

(C) Response to State agency request.—To require all entities in the State (including for-profit, nonprofit, and governmental employers) to provide promptly, in response to a request by the State agency of that or any other State administering a program under this part, information on the employment, compensation, and benefits of any individual employed by such entity as an employee or contractor, and to sanction failure to respond to any such request.

(D) Access to information contained in certain records.—To obtain access, subject to safeguards on privacy and information security, and subject to the nonliability of entities that afford such access under this subparagraph, to information contained in the following records (including automated access, in the case of records maintained in automated data bases):

(i) Records of other State and local government agencies, including—

(I) vital statistics (including records of marriage, birth, and divorce);

(II) State and local tax and revenue records (including information on residence address, employer, income and assets);

(III) records concerning real and titled personal property;

(IV) records of occupational and professional licenses, and records concerning the ownership and control of corporations, partnerships, and other business entities;

(V) employment security records;

(VI) records of agencies administering public assistance programs;

(VII) records of the motor vehicle department; and

(VIII) corrections records.

(ii) Certain records held by private entities with respect to individuals who owe or are owed support (or against or with respect to whom a support obligation is sought), or consisting of—

(I) the names and addresses of such individuals and the names and addresses of the employers of such individuals, as appearing in customer records of public utilities and cable television companies, pursuant to an administrative subpoena authorized by subparagraph (B); and

(II) information (including information on assets and liabilities) on such individuals held by financial institutions.

(E) Change in payee.—In cases in which support is subject to an assignment in order to comply with a requirement imposed pursuant to part A or section 1912, or to a requirement to pay through the State disbursement unit established pursuant to section 654B, upon providing notice to obligor and obligee, to direct the obligor or other payor to change the payee to the appropriate government entity.

(F) Income withholding.—To order income withholding in accordance with subsections (a)(1)(A) and (b) of section 666.

(G) Securing assets.—In cases in which there is a support arrearage, to secure assets to satisfy the arrearage by—

(i) intercepting or seizing periodic or lump-sum payments from—

(I) a State or local agency, including unemployment compensation, workers' compensation, and other benefits; and

(II) judgments, settlements, and lotteries;

(ii) attaching and seizing assets of the obligor held in financial institutions;

(iii) attaching public and private retirement funds; and

(iv) imposing liens in accordance with subsection (a)(4) and, in appropriate cases, to force sale of property and distribution of proceeds.

(H) Increase monthly payments.—For the purpose of securing overdue support, to increase the amount of monthly support payments to include amounts for arrearages, subject to such conditions or limitations as the State may provide.

Such procedures shall be subject to due process safeguards, including (as appropriate) requirements for notice, opportunity to contest the action, and opportunity for an appeal on the record to an independent administrative or judicial tribunal.

(2) Substantive and procedural rules.—The expedited procedures required under subsection (a)(2) shall include the following rules and authority, applicable with respect to all proceedings to establish paternity or to establish, modify, or enforce support orders:

(A) Locator information; presumptions concerning notice.—Procedures under which—

(i) each party to any paternity or child support proceeding is required (subject to privacy safeguards) to file with the tribunal and the State case registry upon entry of an order, and to update as appropriate, information on location and identity of the party, including social security number, residential and mailing addresses, telephone number, driver's license number, and name, address, and telephone number of employer; and

(ii) in any subsequent child support enforcement action between the parties, upon sufficient showing that diligent effort has been made to ascertain the location of such a party, the tribunal may deem State due process requirements for notice and service of process to be met with respect to the party, upon delivery of written notice to the most recent residential or employer address filed with the tribunal pursuant to clause (i).

(B) Statewide jurisdiction.—Procedures under which—

(i) the State agency and any administrative or judicial tribunal with authority to hear child support and paternity cases exerts statewide jurisdiction over the parties; and

(ii) in a State in which orders are issued by courts or administrative tribunals, a case may be transferred between local jurisdictions in the State without need for any additional filing by the petitioner, or service of process upon the respondent, to retain jurisdiction over the parties.

(3) Coordination with ERISA.—Notwithstanding subsection (d) of section 514 of the Employee Retirement Income Security Act of 1974 (relating to effect on other laws), nothing in this subsection shall be construed to alter, amend, modify, invalidate, impair, or supersede subsections (a), (b), and (c) of such section 514 as it applies with respect to any procedure referred to in paragraph (1) and any expedited procedure referred to in paragraph (2), except to the extent that such procedure would be consistent with the requirements of section 206(d)(3) of such Act (relating to qualified domestic relations orders) or the requirements of section 609(a) of such Act (relating to qualified medical child support orders) if the reference in such section 206(d)(3) to a domestic relations order and the reference in such section 609(a) to a medical child support order were a reference to a support order referred to in paragraphs (1) and (2) relating to the same matters, respectively.

(d) Exemption of States

If a State demonstrates to the satisfaction of the Secretary, through the presentation to the Secretary of such data pertaining to caseloads, processing times, administrative costs, and average support collections, and such other data or estimates as the Secretary may specify, that the enactment of any law or the use of any procedure or procedures required by or pursuant to this section will not increase the effectiveness and efficiency of the State child support enforcement program, the Secretary may exempt the State, subject to the Secretary's continuing review and to termination of the exemption should circumstances change, from the requirement to enact the law or use the procedure or procedures involved.

(e) "Overdue support" defined

For purposes of this section, the term "overdue support" means the amount of a delinquency pursuant to an obligation determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a minor child which is owed to or on behalf of such child, or for support and maintenance of the *absent* **noncustodial** parent's spouse (or former spouse) with whom the child is living if and to the extent that spousal support (with respect to such spouse or former spouse) would be included for purposes of *paragraph (4) or (6) of section 654* **section 654(4)** of this title. At the option of the State, overdue support may include amounts which otherwise meet the definition in the first sentence of this subsection but which are owed to or on behalf of a child who is not a minor child. The option to include support owed to children who are not minors shall apply independently to each procedure specified under this section.

(f) Uniform Interstate Family Support Act.—In order to satisfy section 654(20)(A), on and after January 1, 1998, each State must have in effect the Uniform Interstate Family Support Act, as approved by the American Bar Association on February 9, 1993, together with any amendments officially adopted before January 1, 1998 by the National Conference of Commissioners on Uniform State Laws.

(g) Laws voiding fraudulent transfers.—In order to satisfy section 654(20)(A), each State must have in effect—

(1)(A) the Uniform Fraudulent Conveyance Act of 1981;

(B) the Uniform Fraudulent Transfer Act of 1984; or

(C) another law, specifying indicia of fraud which create a prima facie case that a debtor

transferred income or property to avoid payment to a child support creditor, which the Secretary finds affords comparable rights to child support creditors; and

(2) procedures under which, in any case in which the State knows of a transfer by a child support debtor with respect to which such a prima facie case is established, the State must—

(A) seek to void such transfer; or

(B) obtain a settlement in the best interests of the child support creditor.

Sec. 667. State guidelines for child support awards

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular

case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) Technical assistance to States; State to furnish Secretary with copies

The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

Sec. 668. Encouragement of States to adopt simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases

In the administration of the child support enforcement program under this part, each State is encouraged to establish and implement *a simple civil process for voluntarily acknowledging paternity and* a civil procedure for establishing paternity in contested cases.

Sec. 669. Collection and reporting of child support enforcement data

(a) Statistics on need for and actual provision of services

The Secretary of Health and Human Services shall collect and maintain, on a fiscal year basis, up-to-date statistics, by State, with respect to each of the services specified in subsection (b) of this section (separately stated in the case of each such service for families receiving *aid under plans approved* **assistance under State programs funded** under part A of this subchapter and for families not receiving *such aid* **such assistance**), on—

(1) the number of cases in the child support enforcement agency caseload under this part which need the service involved; and

(2) the number of such cases in which the service has actually been provided.

(b) Types of services

The services referred to in subsection (a) of this section are—

(1) paternity determination;

(2) location of *an absent* **a noncustodial** parent for the purpose of establishing a child support obligation;

(3) establishment of a child support obligation; and

(4) location of *an absent* **a noncustodial** parent for the purpose of enforcing or modifying an established child support obligation.

(c) Actual provision of services

For purposes of subsection (a)(2) of this section, a service has actually been provided when the task described by the service has been accomplished.

Sec. 669A. Nonliability for financial institutions providing financial records to State child support enforcement agencies in child support cases

(a) In general.—Notwithstanding any other provision of Federal or State law, a financial institution shall not be liable under any Federal or State law to any person for disclosing any financial record of an individual to a State child support enforcement agency attempting to establish, modify, or enforce a child support obligation of such individual.

(b) Prohibition of disclosure of financial record obtained by State child support enforcement agency.—A State child support enforcement agency which obtains a financial record of an individual from a financial institution pursuant to subsection (a) may disclose such financial record only for the purpose of, and to the extent necessary in, establishing, modifying, or enforcing a child support obligation of such individual.

(c) Civil damages for unauthorized disclosure.—

(1) Disclosure by State officer or employee.—If any person knowingly, or by reason of negligence, discloses a financial record of an individual in violation of subsection (b), such individual may bring a civil action for damages against such person in a district court of the United States.

(2) No liability for good faith but erroneous interpretation.—No liability shall arise under this subsection with respect to any disclosure which results from a good faith, but erroneous, interpretation of subsection (b).

(3) Damages.—In any action brought under paragraph (1), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of—

(A) the greater of—

(i) $1,000 for each act of unauthorized disclosure of a financial record with respect to which such defendant is found liable; or

(ii) the sum of—

(I) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure; plus

(II) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages; plus

(B) the costs (including attorney's fees) of the action.

(d) Definitions.—For purposes of this section—

(1) Financial institution.—The term 'financial institution' means—

(A) a depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) an institution-affiliated party, as defined in section 3(u) of such Act (12 U.S.C. 1813 (u));

(C) any Federal credit union or State credit union, as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752), including an institution-affiliated party of such a credit union, as defined in section 206(r) of such Act (12 U.S.C. 1786(r)); and

(D) any benefit association, insurance company, safe deposit company, money-market mutual fund, or similar entity authorized to do business in the State.

(2) Financial record.—The term 'financial record' has the meaning given such term in section 1101 of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401).

Sec. 669B. Grants to States for access and visitation programs

(a) In general.—The Administration for Children and Families shall make grants under this section to enable States to establish and administer programs to support and facilitate noncustodial parents' access to and visitation of their children, by means of activities including mediation (both voluntary and mandatory), counseling, education, development of parenting plans, visitation enforcement (including monitoring, supervision and neutral drop-off and pickup), and development of guidelines for visitation and alternative custody arrangements.

(b) Amount of grant.—The amount of the grant to be made to a State under this section for a fiscal year shall be an amount equal to the lesser of—

(1) 90 percent of State expenditures during the fiscal year for activities described in subsection (a); or

(2) the allotment of the State under subsection (c) for the fiscal year.

(c) Allotments to States.—

(1) In general.—The allotment of a State for a fiscal year is the amount that bears the same ratio to $10,000,000 for grants under this section for the fiscal year as the number of children in the State living with only 1 biological parent bears to the total number of such children in all States.

(2) Minimum allotment.—The Administration for Children and Families shall adjust allotments to States under paragraph (1) as necessary to ensure that no State is allotted less than—

(A) $50,000 for fiscal year 1997 or 1998; or
(B) $100,000 for any succeeding fiscal year.

(d) No supplantation of State expenditures for similar activities.—A State to which a grant is made under this section may not use the grant to supplant expenditures by the State for activities specified in subsection (a), but shall use the grant to supplement such expenditures at a level at least equal to the level of such expenditures for fiscal year 1995.

(e) State administration.—Each State to which a grant is made under this section—

(1) may administer State programs funded with the grant, directly or through grants to or contracts with courts, local public agencies, or nonprofit private entities;

(2) shall not be required to operate such programs on a statewide basis; and

(3) shall monitor, evaluate, and report on such programs in accordance with regulations prescribed by the Secretary.

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No. 95-1441

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION TO CONSIDER REMANDING THIS CASE OR DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED IN LIGHT OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, PUB. L. NO. 104-193 (AUGUST 22, 1996)

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MOTION TO CONSIDER REMANDING THIS CASE OR DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED IN LIGHT OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, PUB. L. NO. 104-193 (AUGUST 22, 1996)

This Court granted certiorari in this case on May 13, 1996, to decide the following Question Presented:

> Whether custodial parents seeking child support from noncustodial parents can sue state officials under 42 U.S.C. § 1983 for alleged violations of Part IV-D child support program agreements between the States and the federal government when such suits will contravene this Court's precedents, not necessarily remedy a custodial parent's grievances, and violate core principles of federalism and separation of powers. [Petition for Writ of Certiorari at (i).][1]

The reference to "Part IV-D" is to a component of Part IV of the Social Security Act, as amended, 42 U.S.C. § 601 *et seq.*, which governs "Grants to States for Aid and Services to Needy Families with Children . . . ."

On August 22, 1996—well after certiorari was granted and petitioner's brief on the merits was filed—the President signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, popularly known as the welfare reform bill. That Act makes basic structural changes in Part IV-A of the Social Security Act, governing monetary welfare benefits to families with children, and substantially amends Part IV-D while retaining the fundamental structure of that Part.

---

[1] Petitioner's brief on the merits ("Pet. Br.") includes as "Questions Presented" three different questions. Pet. Br. at (i). Whether that brief's three questions are fairly included in the single one raised in the petition is dubious, and is an issue we intend to discuss in our brief on the merits. *See* Supreme Court Rules Rule 14.1(a).

Pursuant to "counsel's . . . continuing duty to inform the Court of any development which may conceivably affect an outcome" of a case on which certiorari has been granted" (*Fusari v. Steinberg*, 419 U.S. 379, 391 (1974) (Burger, C.J., concurring); *see also id.* at 387 n.12 (opinion for the Court)), this Motion presents the relevant differences between Part IV as it existed at the time of the Ninth Circuit decision and the grant of certiorari and Part IV as amended, and indicates why those differences may be relevant to the consideration of this case.

1. This Court has deemed post-certiorari-grant statutory changes that could substantially affect this Court's consideration of the case to be the basis for orders either dismissing certiorari as improvidently granted or remanding the case for consideration in light of the new statute. *See, e.g., Woods v. Durr*, 336 U.S. 941 (1949) (per curiam) (after grant of writ of certiorari, vacating and remanding to the Court of Appeals for consideration of the effect of a newly-enacted federal statute); *Jenkins v. Brewer*, 450 U.S. 904 (1981) (per curiam) (same); *Morris v. Weinberger*, 410 U.S. 422 (1973) (per curiam) (dismissing certiorari as improvidently granted because "[t]wenty days after this Court granted a writ of certiorari . . . Congress amended the relevant statutory provisions.").

The reasons for so proceeding were suggested by Justice Scalia last term in a case in which members of the Court otherwise disagreed about the scope of this Court's authority to grant certiorari, vacate the judgment below, and remand for further consideration ("GVR"), but agreed that such action *is* proper, and traditional, where there has been a change in the governing statute after the Court of Appeals decided the case. Declining to decide in the first instance the impact of a newly-enacted statute not considered by the Court of Appeals is

> appropriate to preserve the operational premise of a multitiered judicial system (*viz.*, that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of . . . lower federal tribunals. [*Stutson v. United States*, 116 S. Ct. 611, 613-14 (1996) (Scalia, J., dissenting).]

See also Lawrence on Behalf of Lawrence v. Chater, 116 S. Ct. 604, 606 (1996) (per curiam) ("a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, . . . [and] assists this Court by procuring the benefit of the lower court's insight before we rule on the merits.")

2. To aid the Court in evaluating whether the present situation is one in which the post-certiorari statutory changes counsel against deciding the case on the merits at this juncture, we begin by summarizing the underlying statutory scheme and its relationship to this case.[2]

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[2] We note that, aside from the statutory changes discussed in the text, there was another intervening change between the time of the Ninth Circuit decision and the present that this Court may wish to take into account in considering the appropriate course with respect to plenary review. In addition to arguing that there is no 42 U.S.C. § 1983 cause of action here, petitioner argues in her merits brief at some length that, under this Court's decision last term in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), issued after the petition was filed, any such cause of action would violate the Eleventh Amendment. Pet. Br. at 23-30. No Eleventh Amendment argument was presented to the Ninth Circuit or in the certiorari petition.

Had petitioners raised any Eleventh Amendment issue in their petition, this Court would have had an opportunity to consider when it acted on the petition whether the case should be "GVR'd" under this Court's practice of remanding to courts of appeal for further consideration where a new decision of this Court may be relevant. *Stutson v. U.S.*, 116 S. Ct. at 613 (Scalia, J., dissenting) (listing cases in which this Court has remanded for consideration of a postjudgment decision of this Court); *Lawrence on Behalf of Lawrence v. Chater*, 116 S. Ct. at 606 ("[w] have GVR'd in

States that accept funds from the federal government to provide welfare benefits to needy children are required, as a condition of accepting those funds, to provide extensive child support services, prescribed by the federal statute in exacting detail (and by implementing regulations expressly called for in the statute), both to children who receive welfare benefits and to all other children whose custodial parent applies for such services. 42 U.S.C. § 602(a)(27) and §§ 651-69. The child support services those states must provide include locating absent parents and establishing paternity, and establishing and enforcing child support obligations for absent parents (including the obligation to provide medical insurance). The federal government in large part funds these child support services provided by the states, and the Social Security Act also provides that states may retain most of the support collected from absent parents on behalf of children receiving welfare benefits, as reimbursement for the welfare benefits provided. 42 U.S.C. §§ 651, 655, 657. The statute as effective at the time of the Ninth Circuit's decision also provided that where the state did collect child support payments on behalf of any child receiving welfare benefits from an absent parent, the first $50 collected was to be remitted by the state to the custodial parent, and not used by the state to reduce or reimburse the welfare payments due. 42 U.S.C. § 657.

This case began with a class action complaint alleging that the state of Arizona was accepting both Part IV-A and Part IV-D funds from the federal government but was failing on a systematic basis to provide the child

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light of a wide range of developments, including our own decisions, see *post*, 613-614 (Scalia, J., dissenting.").

This Court *can*, of course, consider Eleventh Amendment issues raised for the first time in this Court. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Whether it is desirable to do so is another question, for many the same reasons that counsel against considering the impact of a new statute in the first instance.

support services required by Part IV-D, or to provide the $50 "pass-through" payments to custodial parents in a timely manner. Joint Appendix (App.) 12-13, 22, 40-41. The relief sought is purely prospective. App. 42.

The district court dismissed the case on summary judgment for failure to state a cause of action under 42 U.S.C. § 1983. Pet. App. 10b. The sole question decided by the Ninth Circuit on appeal was whether a cause of action is available under 42 U.S.C. § 1983 to enforce the detailed requirements of Part IV-D itself and of the extensive regulations promulgated, pursuant to express statutory direction, by the Secretary of Health and Human Services. Pet. App. 36a.[a]

3. In answering that question, the Ninth Circuit applied this Court's analysis in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), as amplified two years later in *Suter v. Artis M.*, 503 U.S. 347 (1992). Pet. App. 14a. As the Ninth Circuit's opinion makes clear, that analysis is heavily dependent upon the precise provisions of the statutory scheme the plaintiffs seek to enforce under § 1983. Thus, in the course of its decision, the Ninth Circuit compared the statutory scheme in this case with the one in *Wilder* and the one in *Suter*, and concluded that Parts IV-A and IV-D, as here pertinent, more resemble the *Wilder* statute, in which this Court found an enforceable right, than the *Suter* statute, in which this Court found no such right. The Ninth Circuit's analysis paid particular attention to the following statutory provisions, among others: in Part IV-A, 42 U.S.C. § 602(a)(27), and the phrase "substantial compliance" in that section; in Part IV-D, 42 U.S.C. § 654(4)(A), § 654(13), and § 666; and in both Parts, the pass-through and gap-payment provisions, 42 U.S.C. §§ 602(a)(28), 657(b). Pet. App. 14a, 15a, 30a, 31a.

---

[a] As we explain in the Appendix, the relevant provisions in the Reconciliation Act have various effective dates. The most pertinent provisions are effective either immediately or on October 1, 1996.

Judge Kleinfeld, dissenting, also viewed the case as involving the "analytic task to reconcile *Suter* . . . with *Wilder* . . . and apply the principles of those cases to the statute in this case." Pet. App. 38a. And Judge Kleinfeld also discussed the statutory language and structure of Parts IV-A and IV-D in great detail, maintaining that "[t]he 'substantial compliance' standard does not 'unambiguously confer' enforceable rights on any individual" (Pet. App. 39a), and developing his conclusion to that effect based on the exact language of 42 U.S.C. §§ 602(a)(27), 652(a), and 652(i), among other sections. Pet. App. 39a, 40a, 43a.

4. By the same token, in their certiorari papers petitioners argue that "in evaluating whether a particular satutory scheme creates 'enforceable rights,' the Court must carefully examine the particular provisions involved to ensure that Congress intended to create a right or privilege that warrants private enforcement." Pet. 15. And petitioners recite the statutory scheme in detail, citing with particularity, among other provisions, 42 U.S.C. § 602(a)(27), § 652 (governing the Secretary's regulating and auditing functions), and § 652(a)(4) (providing in particular for audits by the Secretary for "substantial compliance" under § 603(h) at least once every three years).[4]

In their brief on the merits, petitioners again stress that to determine under this Court's precedents whether or not a statute creates enforceable rights for purposes of 42 U.S.C. § 1983,

> the Court 'must examine exactly *what* is required of States by the Act,' taking 'pains to analyze the statutory provisions in detail, in light of the *entire* legislative enactment, to determine whether the language in question created 'enforceable rights, privileges or immunities within the meaning of 1983.' *Suter*, 503 U.S. at 357-58 (emphasis added) (quoting *Wright* [*v. Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423 (1987)]; *see also Pennhurst* [*State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)] (examining specific section 'in the context of other more specific provisions of the Act.'). [Pet. Br. 13.]

[4] Included in Appendix D to the Petition as pertinent statutes were Part IV-A §§ 402(a)(27) and 403(h) (42 U.S.C. §§ 602(a)(27) and 603(h)), and Part IV-D § 452 (42 U.S.C. § 652).

And petitioners proceed to engage in precisely that detailed, contextual statutory analysis, relying once again on language from both Part IV-A (42 U.S.C. § 602(a)(27), in particular), and Part IV-D (42 U.S.C. § 652(a)(4), most prominently). Pet. Br. 14-23.[5]

5. Like the Ninth Circuit, we disagree with petitioner and its amici concerning both the import of this Court's precedents concerning the nature of § 1983 enforceable rights and the proper interpertation, in light of those precedents, of the pertinent provisions of Parts IV-A and IV-D of the Social Security Act. At the same time, there is one point that unites the Ninth Circuit majority and dissent, the petitioner, and respondents: We all agree that this Court's established § 1983 enforceable rights analysis requires that the Court "analyze the statutory provisions in detail, in light of the entire legislative enactment, to determine whether the language in question created 'en-

[5] The amicus curiae briefs filed on behalf of petitioner also recognize that this Court's precedents concerning the applicability of § 1983 to a particular federal statute depends upon a detailed, reticulated, and contextual statutory examination, and proceed to engage in such an examination. *See especially* Brief of *Amici Curiae* Illinois et al. at 4 (the enforceable rights issue depends upon "legislative history, the language of the statutes themselves, and the structure of the statutory scheme as a whole"); *id.* at 6-12 (discussing the historical development of Part IV-D); *id.* at 17 & 23 (discussing the audit provisions of the statute, 42 U.S.C. § 652(a)(4)); Brief of the Council of State Governments et al. as *Amici Curiae* in Support of Petitioner, at 15-25 (discussing at length the language and structure of Parts IV-A and IV-D, emphasizing in particular the exact wording of 42 U.S.C. § 602(a)(27) and §§ 652 and 654).

forceable rights, privileges or immunities within the meaning of § 1983.'" *Suter*, 503 U.S. at 357-58, quoting *Wright*, 479 U.S. at 423. That point of agreement makes pertinent that, by reason of the August 22, 1996 amendments, the "entire legislative enactment" in effect when the Ninth Circuit decided this case, when certiorari was granted, and when petitioners filed their brief is not the "entire legislative enactment" in effect now and in the future.

That point is particularly pertinent because the complaint in this case seeks only prospective relief against ongoing conduct, so that the relevant statutory provisions are the ones in effect when the case is decided, not those in effect when the complaint was filed. *Fusari v. Steinberg*, 419 U.S. at 387; *Tully v. Mobil Oil*, 455 U.S. 425, 247 (1982); *see also Landsgraf v. USI Film Products*, 114 S. Ct. 1483, 1499 n. 23, 1501 (explaining that "[w]hen the intervening statute . . . affects the propriety of injunctive relief" application of that new statute is "unquestionably proper".) In preparing our brief we therefore have been faced with the need to discuss in detail a statutory scheme in many critical respects very different from the one previously canvassed in this case. It is in the course of doing so that we have come to the conclusion that the statutory changes are sufficiently widespread and relevant that we have an obligation under *Fusari* to bring them to the attention of this Court at this time.[6]

The particular changes made by the new statute which may affect this Court's ultimate conclusion whether or

[6] The difficulty of analyzing for the first time a complex statutory scheme never before addressed either in this case or any other has been compounded for respondents, and is likely to be compounded for the Court, by the fact that so far as we can determine there is as yet no available, integrated version of the Social Security Act that correlates the eighty-eight pages of amendments to Part IV-A (as printed in the House Conference Report) and the sixty-four pages of amendments to Part IV-D with the prior provisions so that the relevant statutory provision can be read in context and as a coherent whole.

not § 1983 creates enforceable rights are set out in detail in Appendix A, attached hereto. Those changes include, most prominently, fundamental alterations in the two of the provisions most often cited by petitioners and their amici in support of their position, 42 U.S.C. § 602 (a)(27), providing that the state's child support services obligation is a condition of receiving federal funds under Part IV-A, and 42 U.S.C. § 652(a)(4), providing for federal review and auditing in order to enforce that obligation.

6. We hasten to add that we do *not* believe the statutory changes worked by the Reconciliation Act ultimately will alter the appropriate answer to the question whether a cause of action lies under 42 U.S.C. § 1983 to enforce the child support service requirements that the states promise to provide in exchange for receiving federal funds under both Part IV-A and Part IV-D. Rather, the Ninth Circuit's conclusion that § 1983 provides such a cause of action is all the more correct in light of the recent amendments.

Nonetheless, those amendments do raise questions concerning the necessity and wisdom of proceeding with plenary review of this case. The petition for writ of certiorari was premised squarely upon a circuit conflict on the viability of § 1983 actions to enforce Part IV-D. Pet. 8. Resolving that conflict is of much less importance now. Because the underlying statute has changed, the Courts of Appeals that have addressed the question may not reach the same conclusion in a future § 1983 case brought under Part IV-D.

Moreover, the Court, if it hears this case on the merits, will be construing and applying brand new, complex statutory provisions that neither any other court nor the administrator involved in enforcing § IV-D has had any opportunity to consider. "[T]he operational premise of a multitiered judicial system (*viz.*, that lower courts will have the first opportunity to apply the governing law to

the facts") (*Stutson v. United States*, 116 S. Ct. 611, 613 (Scalia, J., dissenting)) may well counsel against doing so.

CONCLUSION

For the reasons stated above, the Court should take notice of developments after the petition for writ of certiorari was granted and consider whether to remand this case or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT CHANGES MADE BY THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, PUB. L. NO. 104-193, IN PARTS IV-A AND IV-D OF THE SOCIAL SECURITY ACT

(a) Previously, Part IV-A of the Social Security Act ("SSA") provided that to receive federal matching funds for aid and services to needy families with children, states must submit a state plan containing a number of detailed provisions, among them a provision that:

> the State has in effect a [p]lan approved under part [IV-D of the SSA] and operates a child support program in substantial compliance with such plan. [42 U.S.C. § 602(a)(27).]

The Reconciliation Act entirely replaces Part IV-A with a provision for "Block Grants to States for Temporary Assistance for Needy Families," eliminates 42 U.S.C. § 602(a)(27), and substitutes a provision that reads as follows:

> As used in this part, the term 'eligible State' means, with respect to a fiscal year, a State that, during the 2-year period immediately preceding the fiscal year, has submitted to the Secretary a plan that the Secretary has found includes the following: . . .
>
> . . . (2) *Certification that the State will operate a child support enforcement program.*—A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D. [Reconciliation Act § 103(a)(2), amending SSA § 402, 42 U.S.C. § 602; Conf. Rep. 11.] [1]

---

[1] Citations to the Reconciliation Act are accompanied by page references to the new Act as printed in the Conference Report to

Among other differences, this provision establishing the nature of the state's commitment in accepting funds under Part IV-A does not contain the "substantial compliance" language of the analogous section in the prior statute, 42 U.S.C. § 602(a)(27), discussed extensively by both Ninth Circuit opinions and by petitioners and their amici.

(b) Part IV-A now contains four similar, pertinent provisions with no parallel in the earlier statute.

(i) Section 103 of the Reconciliation Act, (Conf. Rep. 10), adds SSA § 401(b), 42 U.S.C. § 601(b), which provides:

> This part [Part A] shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.

(ii) Section 103 of the Reconciliation Act (Conf. Rep. 36), adds SSA § 408(a)(7)(E), 42 U.S.C. § 608(a)(7)(E), which provides:

> Subparagraph A shall not be interpreted to require any State to provide assistance to any individual for any period of time under the State program funded under this part.

(iii) Section 116(b)(1)(C) of the Reconciliation Act (Conf. Rep. 83), provides:

> The submission of a plan by a State pursuant to subparagraph (A) is deemed to constitute— . . . .
>
> (ii) the termination of any entitlement of any individual or family to benefits or services under the State AFDC program.

Accompany H.R. 3784, H.R. Rep. No. 104-725, 104th Cong., 2d Sess. (1996) (hereinafter "Conf. Rep."), a copy of which is being lodged with the Court along with this Motion.

The provisions in the Reconciliation Act become effective on various dates. Reconciliation Act § 103(a)(2), set forth above, is effective on the date on which a State submits a new part IV-A State plan or July 1, 1997, whichever is earlier. Reconciliation Act §§ 116(a)(1) and (b)(1)(A), Conference Rep. 81.

(iv) Section 116(c) of the Reconciliation Act (Conf. Rep. 84), provides:

> Effective October 1, 1996, no individual or family shall be entitled to any benefits or services under any State plan approved under part A or F of title IV of the Social Security Act (as in effect on September 30, 1995).

The original welfare reform bill introduced in the 104th Congress had contained similar statements with respect to the entitlement to individuals to services under Part IV-D. H.R. 4, § 302, 104th Cong., 1st Sess. (January 4, 1995):

> [A]ll entitlement of individuals to benefits established under the following programs . . . is terminated . . . The program of aid and services to needy families with children under part A . . ., the child support enforcement program under part D . . . and the at-risk child care grant program under part A.

The statutory statements in the Reconciliation Act regarding nonentitlement to certain benefits and services, and the pointed failure to include Part IV-D in those statements while extensively amending IV-D otherwise, as noted below, are relevant in determining that Part IV-D as amended creates enforceable rights.

(c) The audit and penalty provisions linking Parts IV-A and IV-D have been changed as follows:

Prior SSA § 403(h), 42 U.S.C. § 603(h) provided that:

> [I]f a State's program operated under part D . . . is found as a result of a review conducted under section 452(a)(4) [42 U.S.C. § 652(a)(4)] not to have complied substantially with the requirements of such Part . . . the amount otherwise payable to the State under this part for such quarter and each subsequent quarter, prior to the first quarter throughout which the State program is found to be in substantial

> compliance . . . shall be reduced [by specified percentages].

Substantial compliance was defined as full compliance, except for:

> noncompliance . . . of a techanical nature which does not adversely affect the performance of the child support enforcement program. [42 U.S.C. § 602(h)(3).]

The audit section, implementing this penalty provision, was contained in Part IV-D, and read:

> 42 U.S.C. § 652(a)(4): The Secretary shall . . . (4) evaluate the implementation of State programs established pursuant to such [State IV-D] plan, conduct such audits of State programs established under the plan approved under this part as may be necessary to assure their conformity with the requirements of this part, and, not less often than once every three years . . . conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 403(h) [42 U.S.C. § 603(h)] . . . whether the actual operation of such programs in each State conforms to the requirements of this part . . . .

Thus, while SSA § 452(a)(4), 42 U.S.C. § 652(a)(4), did not itself contain the term "substantial compliance", the cross-reference to SSA § 403(h), 42 U.S.C. § 603(h), incorporated that term for the purpose of certain federal audits.

The new Act contains a provision substantially similar to prior SSA § 403(h). Reconciliation Act § 103(a)(1) (Conf. Rep. 43-44), which adds SSA § 409(a)(8), 42 U.S.C. § 609(a)(8). SSA § 452(a)(4), 42 U.S.C. § 652(a)(4), however, has been significantly changed.

The new Act has a separate Title, "Title III—Child Support", which is sixty-four pages long. Title III contains Subtitle E—Program Administration and Funding (Conf. Rep. 132), which in turn contains a section, Reconciliation Act § 342, entitled "Federal and State Reviews and Audits". Conf. Rep. 134-35. Section 342 reads, as here pertinent, as follows:

> (a) *State Agency Activities*—Section 454 (42 U.S.C. § 654) is amended . . . by inserting after paragraph (14) the following new paragraph:
>
> > "(A) A process for annual reviews of and reports to the Secretary on the State program operated under the State plan approved under this part, including such information as may be necessary to measure State compliance with Federal requirements for expedited procedures, using such standards and procedures as are required by the Secretary, under which the State agency will determine the extent to which the program is operated in compliance with this part; and—
> >
> > (B) a process of extracting from the automated data processing system required by paragraph (16) and transmitting to the Secretary data and calculations concerning the levels of accomplishment (and rates of improvement) with respect to applicable performance indicators (including paternity establishment percentages) to the extent necessary for purposes of sections 452(g) and 458 [42 U.S.C. §§ 652(g), 658]."[2]
>
> (b) *Federal Activities.*—Section 452(a)(4) (42 U.S.C. § 652(a)(4) is amended to read as follows:

[2] SSA §§ 452(g) and 458, 42 U.S.C. §§ 652(g) and 658, establish formulas for assessing the *outcomes* of the states' child support service efforts, by assessing the extent to which whether state programs are actually making paternity determinations (§ 452(g)) and the cost efficiency with which states are actually collecting child support payments.

"(4)(A) review data and calculations transmitted by State agencies pursuant to section 454(15)(B) on State program accomplishments with respect to performance indicators for purposes of subsection (g) of this section and section 458.

(B) review annual reports submitted pursuant to section 454(15)(A) and, as appropriate, provide to the State comments, recommendations for additional or alternative corrective actions, and technical assistance; and

(C) conduct audits, in accordance with the Government auditing standards of the Comptroller General of the United States—

(i) at least once every three years (or more frequently, in the case of a state which fails to meet the requirements of this part concerning performance standards and reliability of program data) to assess the completeness, reliability, and security of the data and the accuracy of the reporting systems used in calculating performance indicators under subsection (g) of this section and section 458;

(ii) of the adequacy of financial management of the State program operated under the State plan approved under this part, including assessments of—

(I) whether Federal and other funds made available to carry out the State program are being appropriately expended, and are properly and fully accounted for; and

(II) whether collections and disbursements of support payments are

carried out correctly and are fully accounted for; and

(III) for such other purposes as the Secretary may find necessary." [Conf. Rep. 134-35] [3]

Among other major differences between the new provision and prior 42 U.S.C. § 652(a)(4) is the exclusion of any cross-reference to the pertinent penalty provisions of Part IV-A, now SSA § 409(a)(8), 42 U.S.C. § 609(a)(8).

(d) The language of Part IV-D setting out the basic child support services obligations of the states has been changed as follows:

Section 454 of the Social Security Act, 42 U.S.C. § 654, provides:

A State plan for child and spousal support must—

. . . (4) provide that Such State will undertake—

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title . . . is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so . . . and

(B) in the case of any child with respect to whom such assignment is effective . . . to secure support for such child from his parent (or from

[3] This amendment is "effective with respect to calendar quarters beginning 12 months or more after the date of the enactment of this Act." Reconciliation Act § 342(c); Conf. Rep. 135.

any other person legally liable for such support) and from such parent for his spouse (or former spouse) receiving aid to families with dependent children or medical assistance under a State plan approved under subchapter XIX of this chapter, but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan), utilizing any reciprocal arrangement adopted with other States (unless the agency administering the plan of the State under part A or E of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so), except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support. . . .

And, SSA § 454(6)(A), 42 U.S.C. § 654(6)(A), requires that a state plan provide that:

> the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, including support collection services for the spouse (or former spouse) with whom the absent parent's child is living (but only if a support obligation has been established with respect to such spouse, and only if the support obligation established with respect to the child is being enforced under the plan). . . .

Reconciliation Act § 301 amends SSA § 454(4), 42 U.S.C. § 654(4), by: striking paragraph (4) and inserting a new paragraph (4) requiring that the State provide

services relating to establishment of paternity and establishment, modification, or enforcement or child support for:

> (i) each child for whom assistance is provided under the State program funded under part A of this title . . . unless, in accordance with paragraph (29), good cause or other exceptions exist;
>
> (ii) any other child, if an individual applies for such services with respect to the child; and
>
> (B) enforce any support obligation established with respect to—
>
> (I) a child with respect to whom the State provides services under the plan; or
>
> (II) the custodial parent of such a child. [Conf. Rep. 99.][4]

Reconciliation Act § 301(a)(2)(A) also eliminates present SSA § 464(6)(A), 42 U.S.C. § 654(6)(A).

The language and structure differences between the old and new versions of 42 U.S.C. § 654(4) and 654(6) appear to be simply clarifications of present law. *See* H.R. Rep. 104-651, 104th Cong., 2d Sess. (1996) at 1997; Budget Reconciliation Recommendations of the Committee on Finance, 104th Cong. 2d Sess., at 80. However, the designee of the Secretary of Health and Human Services has had no opportunity pursuant to her explicit authority to set standards for State programs under the statute to confirm that the new language requires no changes in those standards. *See* 42 U.S.C. § 652(1) (The Secretary's designee shall "establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and

---

[4] It appears that this provision is "effective with respect to periods beginning on and after October 1, 1996." Reconciliation Act § 395; Conf. Rep. 161.

support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective.")

(e) The Reconciliation Act replaces the Part IV-D section governing the "Distribution of Proceeds," SSA § 457, 42 U.S.C. § 657, with an entirely new provision entitled "Distribution of Collected Support." Reconciliation Act § 302; Conf. Rep. 100-101.

The prior provision, as presently in force,[5] provides that:

> (1) of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due, shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;
>
> (2) such amounts as are collected periodically which are in excess of any amount paid to the family under paragraph (1) and which represent monthly support payments shall be retained by the State to reimburse it for assistance payments to the family during such period . . .;
>
> (3) such amounts as are in excess of the amounts retained by the State under paragraph (2) and are not in excess of the amount required to be paid during such period to the family by a court or administrative order shall be paid to the family; and
>
> (4) such amounts as are in excess of amounts required to be distributed under paragraphs (1), (2)

[5] The amendments to 42 U.S.C. § 657 are effective "on October 1, 1996, or earlier at the State's option." Reconciliation Act § 302(c); Conf. Rep. 104.

> and (3) shall be (A) retained by the State . . . as reimbursed for any past assistance payment made to the family for which the State has not been reimbursed or (B) if no assistance payments have been made by the State which have not been repaid, such amounts shall be paid to the family. [42 U.S.C. § 657(b)]

This entire provision, including the $50 "pass through" payment, is eliminated in the Reconciliation Act. Rather, with respect to "families receiving assistance," the Reconciliation Act provides that it is up to the state whether to "retain, or distribute to the family, the State share of the amount so collected." Reconciliation Act § 302, amending SSA § 457(a)(1); 42 U.S.C. § 657(a)(1); Conf. Rep. 100.

With respect to "Families that Formerly Received Assistance", the Reconciliation Act has complex provisions governing the distribution of support payments. Previously, when support arrearages were collected, states were first reimbursed for past assistance payments to the family. 42 U.S.C. § 657(b)(4). Now, families no longer receiving assistance will in many circumstances be paid the arrearages accrued when they were not receiving assistance before the state is entitled to reimbursement for any past amounts paid to the family as assistance. Reconciliation Act § 302, amending SSA § 457(a)(2); Conf. Rep. 100.

(f) The remainder of the extensive amendments to Part IV-D, in the main, establish even more stringent requirements for states that accept federal funds to pay for IV-D services and for IV-A assistance payments than the prior statute, including: time limits for distributing support services, additional requirements for wage withholding procedures, standards for expedited administrative procedures for paternity and child support adjudications, mandates for penalties for nonpayment of child support including

suspension of professional licenses and drivers' licenses, additional requirements for review and modification of child support obligations, and mandatory enforcement of child obligations against grandparents when the children are minors. Reconciliation Act §§ 312, 304, 314, 325, 331, 369, 370, 351 & 373.

No. 95-1441

(12)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO CONSIDER REMANDING THIS CASE OR DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED

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INTRODUCTION

In proposing that this Court take the extraordinary steps of removing this case from the docket and remanding it ("GVR") to the Ninth Circuit for further consideration in light of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105-2355 ("Reconciliation Act"), Respondents make two concessions fatal to their Motion. First, by admitting that the Reconciliation Act "retain[s] the fundamental structure" of Title IV-D, Mot. at 1, Respondents essentially concede that there is no controlling "intervening development" that would justify a GVR order. Indeed, Congress has not altered the core provisions of Title IV-D that form the basis of Petitioner's argument that Respondents cannot sue privately to enforce Title IV-D. Second, Respondents openly concede that the Reconciliation Act will have *no effect* on the Ninth Circuit's decision to create a right that Respondents can enforce under 42 U.S.C. § 1983. Mot. at 9. Thus, a remand to that court would serve no purpose except to generate considerable cost and delay and to continue the doctrinal confusion that caused the Court to grant the Petition in the first place.

In addition to Respondents' concessions, the Reconciliation Act has no bearing on the broad issues that this case raises: (1) whether a federal court can authorize a private right of action against State officials to enforce aspects of federal-state Title IV-D program agreements when Congress has *never* explicitly or implicitly provided such a right; (2) whether the Eleventh Amendment bars Respondents' action; and (3) whether Respondents' suit, which seeks relief for a State's alleged violation of Spending Clause legislation, is beyond the proper scope of § 1983 as a matter of law. Dismissal of the writ would leave these important statutory and constitutional questions unresolved. The costs to the States and to the principles of federalism and separation of powers are too great to sweep this case under the rug by returning it to the Ninth Circuit.

In short, nothing has happened to suggest that the Court granted the Petition for Certiorari improvidently or that

remanding the case would ultimately change the issues or analyses presented to this Court. Accordingly, Respondents' Motion should be denied. In fact, if Respondents are correct that the Reconciliation Act materially changed the landscape surrounding Title IV-D, then Respondents' Complaint, which seeks prospective relief only, is no longer justiciable and the only proper course of action is to vacate the court of appeals' judgment and dismiss the Complaint. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

ARGUMENT

NEITHER THE FACTS NOR THE LAW JUSTIFIES DISMISSAL OF CERTIORARI OR AN IMMEDIATE REMAND.

A. A Remand to the Court of Appeals Would Serve No Purpose Except to Delay and Add Further Costs.

Dismissing the writ of certiorari after Petitioner has filed her merits brief is an extraordinary action that this Court should not undertake lightly. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 80 (1955) (Black, J., dissenting) (dismissal should be used only in "very unusual circumstances"). As this Court stated just last Term,

> Where *intervening developments*, or recent developments that we have reason to believe the court below did not fully consider, reveal a *reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration*, and *where it appears that such a redetermination may determine the ultimate outcome of the litigation*, a GVR order is, we believe, *potentially* appropriate. Whether a GVR is ultimately appropriate *depends further on the equities of the case*: if it appears that . . . the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.

Lawrence on Behalf of Lawrence v. Chater, 116 S. Ct. 604, 607 (1996) (per curiam) (emphases added). *See id.* at 609 ("GVR power should be exercised sparingly"). Respondents' suggested intervening development – enactment of the Reconciliation Act – and the facts of this case fail to satisfy this Court's standards for GVR.

1. The Reconciliation Act is not a controlling "intervening development."

Respondents' attempts to divert the Court's attention to the Reconciliation Act's immaterial changes and away from the core issues in dispute amount to little more than a shell game. This Court should not allow Respondents to misdirect its attention to the irrelevant "basic structural changes in Part IV-*A* of the Social Security Act" (Mot. at 1), the "eighty-eight pages of amendments to Part IV-*A*" (*id.* at 8 n.6), and the copy of the House Conference Report to Accompany H.R. 3734 that Respondents lodged with the Court.

To be sure, the Reconciliation Act – commonly known as the "Welfare Reform Act" – contains massive changes to the entire federal *welfare* system, including the Food Stamp program, the Child Care program, and the Supplemental Security Income program. This case, however, does not concern those welfare programs. Rather, this case

> is an action for declaratory and injunctive relief alleging that administration of the Arizona state program for collection of child support and provision of various related services required by *Title IV-D of the Social Security Act*, 42 U.S.C. § 651 *et seq.*, violates federal law and regulations enforceable by the plaintiffs . . . in an action brought pursuant to 42 U.S.C. § 1983.

J.A. at 5-6 (emphasis added). Thus, the Court's focus should be on Title IV-D, not on provisions of other, irrelevant programs.

Even Respondents concede, as they must, that the Reconciliation Act retains the "fundamental structure" of Title IV-D. Mot. at 1. The Reconciliation Act simply builds upon Title

IV-D's existing framework; it does not alter Title IV-D's core scheme. Moreover, the enhancements that it adds to Title IV-D have *no substantive effect* upon the proper outcome of this case.[1] As before, the core services that participating States provide include: attempting to locate absent parents (42 U.S.C. §§ 652(a)(1), 654(8), 654(9)(B)); attempting to establish paternity (42 U.S.C. §§ 654(4)(A), 654(6)); establishing child (and medical) support orders (42 U.S.C. §§ 654(4), 654(6), 652(f)); modifying support orders (42 U.S.C. § 666(a)(10)); and enforcing support orders (42 U.S.C. §§ 654(9), 654(20)). The Reconciliation Act also leaves intact Title IV-D's requirement that the Secretary of Health & Human Services ("Secretary") conduct a complete program audit of a State's Title IV-D program at least triennially and an annual audit if the program fails substantially to comply with Title IV-D's standards. 42 U.S.C. § 652(a)(4). Congress did not alter this case by passing the Reconciliation Act.[2] *See* Appendix A.

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[1] For example, the Reconciliation Act nationalizes the successful enforcement programs that Arizona and other States have developed on an experimental basis by adding program enhancements such as (1) suspension and revocation of professional, occupational, and drivers licenses (Reconciliation Act § 369, 110 Stat. 2251 (to be codified as 42 U.S.C. § 666(a)(16)); Arizona has had such programs for years (professional licenses – 1990; drivers licenses – 1995) (*see* Arizona Revised Statutes ("A.R.S.") §§ 25-320.01, 25-502 , 25-517); (2) new hire reporting (Reconciliation Act § 313(b), 110 Stat. 2209 (to become § 653A)); Arizona provided leadership in developing this program in 1994 (A.R.S. § 23-722.01); and (3) centralized payment processing for Title IV-D cases (Reconciliation Act § 312(b), 110 Stat. 2207 (to become § 654B)); Arizona again played a leadership role (A.R.S. § 46-441). The addition of these and other enhancements to Title IV-D does not alter this case in the slightest.

[2] The cases that Respondents cite in support of GVR are inapposite. For example, after this Court granted certiorari in *Morris v. Weinberger*, 410 U.S. 422 (1973) (per curiam), Congress completely *repealed* the section of the Social Security Act that had been held to bar the Plaintiff's claim. The issue in *Woods v. Durr*, 336 U.S. 941 (1949) (per curiam), was whether section 209(a) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, prohibited plaintiff's eviction. *See Woods v. Durr*, 170 F.2d 976 (3d Cir. 1948). After the Court granted

2. There is no "reasonable probability" that the Ninth Circuit would reverse itself if a remand occurs.

Respondents have not shown that the suggested intervening event here – passage of the Reconciliation Act – would affect the decision below on remand. To the contrary, Respondents openly concede that the Reconciliation Act will *not* change the result the court of appeals reached, and they assert that the Ninth Circuit's decision "is *all the more correct* in light of the recent amendments." Mot. at 9 (emphasis added). It is, therefore, difficult to imagine what legitimate purpose Respondents believe a remand would serve at this juncture.

3. The equities of the case counsel against a remand at this stage.

A remand order not only would inflict delay and additional costs upon Petitioner and the State of Arizona, but also would harm other Title IV-D beneficiaries – children and their custodial parents – because every dollar and minute that Petitioner and her agency spend responding to this lawsuit comes from the same pool of resources that the State uses to provide Title IV-D services. *See* Pet. Br. at 2. Thus, the monetary and human costs inherent in a remand clearly outweigh whatever speculative benefit, if any, that a remand would engender.[3]

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certiorari, Congress again amended the section and the Housing Expediter promulgated entirely new regulations pursuant to the amendment. Both of these cases dealt with changes in specific statutory provisions whose language would control the Court's resolution of the issue presented. Congress has not effected any similar change in this case.

[3] As set forth in the *amici curiae* briefs filed by 46 States and Territories, the Council of State Governments, the National Conference of State Legislatures, the National Governors Association, and others, those additional costs will be borne by many others beyond just the Petitioner, Respondents, and the Arizona children and custodial parents.

B. This Court Did Not Grant the Petition Improvidently in Light of the Serious Statutory and Constitutional Issues That the Petition Poses.

Nothing in the Reconciliation Act resolves the statutory and constitutional issues that Petitioner presented and discussed in her opening brief.

1. The Reconciliation Act does not alter the statutory analysis of the relevant provisions of Title IV-D.

Petitioner argued in her opening brief that, under the test established in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 503 U.S. 347 (1992), Title IV-D does not create rights that Respondents can enforce under § 1983. *See* Pet. Br. at 12-19. The Reconciliation Act does nothing to change this conclusion. First, the Reconciliation Act does not cure Title IV-D's failure to create an express private cause of action in Respondents' favor. As Petitioner explained in detail (Pet. Br. at 6-7, 16), this Court has insisted that Congress impose all conditions upon Spending Clause grants "unambiguously" and with a "clear voice." Respondents do not even attempt to claim that the Reconciliation Act adds the requisite level of clarity. Thus, any attempt by federal courts to create a private cause of action against State officials still implicates the same federalism and separation-of-powers concerns that Petitioner raised.

Second, Petitioner argued that, under the Court's existing precedents, no § 1983 cause of action is available unless the underlying statute provides a clear right – a guarantee that each affected individual will receive certain benefits. Pet. Br. at 13. The Ninth Circuit rejected that argument, and Title IV-D still does not guarantee any individual recoveries. Thus, the issue presented remains completely unaffected by the changed statute, and the question still warrants resolution by this Court

to provide lower courts with guidance in deciding which federal laws are enforceable under § 1983.[4]

Third, the Reconciliation Act does not add any provisions to Title IV-D that make the States the guarantors of child support enforcement and paternity establishment. The real cause of Respondents' injuries – failure to receive support – remains the absent parent, not the State. Thus, it also remains true that no individual Respondent can establish the causation or redressability elements of Article III standing, much less any statutory "right." *See* Pet. Br. at 16-19.

Fourth, notwithstanding Respondents' assertions to the contrary (Mot. at 1a, 2a), the statutory test for State conformity with Title IV-D remains "*substantial* compliance" – not "complete," "full," or "total" compliance. *See* Reconciliation Act, 110 Stat. 2145. Thus, it is true – as it always has been – that Title IV-D does not guarantee that States will collect child support payments for every applicant in every case every time.

Fifth, the Reconciliation Act does not alter Congress's carrot-and-stick approach for encouraging compliance by participating States. The Reconciliation Act retains incentive payments to reward States that perform their services efficiently and expeditiously. *Compare* 42 U.S.C. § 658 *with* Reconciliation Act § 341(a), 110 Stat. 2231. As before, the Secretary must conduct a program audit at least triennially. In the event that the Secretary's audit determines that a State's Title IV-D program is not in substantial compliance, the penalties that can be assessed remain the same. *Compare* 42

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[4] If this Court rejects Petitioner's basic position and the holdings upon which Petitioner relied and instead adopts a standard that is less categorical than the one that she proposes, it might be appropriate for the Court to remand then to allow the Ninth Circuit to apply this Court's analysis to the specific requirements of Title IV-D. This approach would fully satisfy the concerns that Justice Scalia expressed in *Stutson v. United States*, 116 S. Ct. 611, 613-614 (1996), which Respondents cite (Mot. at 3). But a remand without guidance from this Court will be a useless exercise, as Respondents concede, and thus will undermine the efficiency that the summary process of vacating and remanding is designed to further.

U.S.C. § 652(a)(4) *with* Reconciliation Act, 110 Stat. 2146. Plus, Congress retained the Secretary, not private individuals such as Respondents, as the person responsible for ensuring compliance with Title IV-D. *See* Pet. Br. at 20-23. Moreover, it is the *existence* of the incentives and penalties, rather than their specific formulas, that Petitioner relies upon to support her argument that Title IV-D does not create enforceable rights in Respondents by imposing binding obligations on participating States.[5]

Finally, the Reconciliation Act does not substantially alter the administrative enforcement scheme that Congress designed. Congress chose the precise remedies it felt were appropriate; private suits by individuals such as Respondents were not among the remedies that Congress authorized. *See* Pet. Br. at 20-23.

2. The Reconciliation Act does not affect Petitioner's argument that the Eleventh Amendment bars Respondents' suit.

Respondents do not even attempt to argue that the Reconciliation Act affects Petitioner's Eleventh Amendment arguments.[6] The Reconciliation Act does not purport to abrogate

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[5] Although the Reconciliation Act does make some changes to the audit and penalty scheme (such as making more effective use of automation and focusing on performance indicators, *see* Mot. at 4a-6a), these changes would not affect the Ninth Circuit's decision given the majority's conclusion that any such scheme is insufficient to establish congressional intent to preclude a private cause of action. Pet. App. at 25a-26a.

[6] Respondents do suggest, however, that Petitioner's Eleventh Amendment arguments somehow provide an additional basis for dismissal or remand. Mot. at 3 n.2. Their suggestion is without merit. First, although it is true that this Court did not issue its decision in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), until after the Ninth Circuit issued its decision in this case and Petitioner had filed her Petition for Certiorari, Petitioner specifically mentioned *Seminole Tribe* in her Reply in Support of Petition for Certiorari (Apr. 15, 1996). Thus, Respondents' contention that

participating States' sovereign immunity. Moreover, the Reconciliation Act continues to require actions from and impose obligations on participating "States" and their "state agencies," not upon State officers such as the State Director, thus reinforcing that Congress did not intend to create an *Ex parte Young* cause of action under the Title IV-D. *See* Pet. Br. at 28-29.[7] Respondents' Motion demonstrates the importance of this distinction by making it plain that Respondents are not looking only to the State Director for relief. *See, e.g.*, Mot. at 4-5 ("class action complaint alleging that the *state of Arizona* . . . was failing on a systematic basis to provide the child support services required by Part IV-D") (emphasis added).

Petitioner failed to give this Court the "opportunity to consider when it acted on the petition whether the case should be GVR'd" (Mot. at 3 n.2) is inaccurate. Second, as Respondents concede, even if the Petition had not raised the Eleventh Amendment argument, this Court is free to "consider Eleventh Amendment issues raised for the first time in this Court. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945)." Mot. at 4 n.2. Third, for the Court to remand this case for the Ninth Circuit to apply *Seminole Tribe* would be a waste of time, because the Ninth Circuit majority already revealed its lack of concern for State sovereignty when it justified its holding on the theory that "the contempt power of the court, as well as other traditional equitable remedies, is likely to be more successful in inducing compliance on the part of state officials, and where necessary, *state legislators*." Pet. App. at 29a (emphasis added).

[7] *See, e.g.*, Reconciliation Act § 301(a)(1), 110 Stat. 2199 ("the *State* will"), § 342(b), 110 Stat. 2233 ("by the *State agency*"), and § 314(a)(F), 110 Stat. 2214 ("the *agency* administering the State plan")(emphases added). The *only* exception appears in the Reconciliation Act at § 353, 110 Stat. 2240, which establishes personal liability for "State officers and employees" who improperly release private financial information. Of course, Respondents' Complaint does not allege any violation of this new provision.

3. The Reconciliation Act has no effect on Petitioner's argument that Respondents' suit is beyond the proper scope of § 1983.

Petitioner has asked this Court to limit the holding of *Maine v. Thiboutot*, 448 U.S. 1 (1980), to those substantive statutes that create an express cause of action or to those enacted pursuant to Congress's power under the Fourteenth Amendment. *See* Pet. Br. at 30-49. The Reconciliation Act does nothing to alter the propriety of such a limitation. First, the Reconciliation Act did not purport to amend § 1983, and Respondents do not argue otherwise. Second, even after the Reconciliation Act amendments, Title IV-D remains Spending Clause legislation, not legislation enacted pursuant to Congress's power under the Fourteenth Amendment. Thus, certiorari remains appropriate to resolve this important question regarding the proper scope of § 1983.

Petitioner's opening brief demonstrates the crying need for this Court to realign the relationship between Congress and the courts in determining when a State is amenable to suit for alleged violations of federal law under § 1983. Where Congress has not expressly exposed States to private actions as a condition of receiving federal moneys, courts have inconsistently granted private rights in some cases and denied them in others. Ironically, the recent amendments to Title IV-D merely reflect this same core problem – while Congress remained mute on the essential question of the availability of a private cause of action, its nonaction will be more than sufficient to lead the Ninth Circuit to hold that Respondents can sue the State. Instead of supporting vacatur or dismissal, Congress's silence on the issue presented here reinforces the national importance of having the Court decide this case.

C. In the Face of a Controlling Intervening Event, the Proper Course of Action Is to Dismiss the Complaint, Not the Writ.

If Respondents are correct that the Reconciliation Act creates a "statutory scheme in many critical respects very different from the one previously canvassed in this case,"

Mot. at 8, then this Court's proper course of action is not to dismiss the writ or vacate and remand to the Ninth Circuit, but rather to vacate the decision below and remand with instructions to dismiss the Complaint as moot or no longer ripe.

Respondents' main thesis is that the Reconciliation Act worked such a substantial change to Title IV-D that this Court cannot proceed. If this is true, the logical conclusion is that this Court should order dismissal of the Complaint, not the writ of certiorari. Both parties agree that the Complaint seeks "only prospective relief" to force the State to comply with Title IV-D requirements. *Id.* Both parties further agree that "the relevant statutory provisions are the ones in effect when the case is decided [by this Court], not those in effect when the complaint was filed." *Id.* But Arizona cannot be found to be *out* of compliance when the Reconciliation Act's statutory provisions have not yet become effective and when, as Respondents concede, the Secretary – the person charged with the responsibility of enforcing Title IV-D – has not had "any opportunity to consider" and analyze the Reconciliation Act or to promulgate interpretive regulations. Mot. at 9.

The absence of regulations is significant. For example, the Reconciliation Act gives the Secretary two years in which to develop regulations concerning automated data processing and information retrieval systems. Reconciliation Act § 344(a)(3), 110 Stat. 2236. Until these regulations are in place, States do not know exactly what information they must capture or in what format. This undefined situation is significant because under the Reconciliation Act audits will be conducted initially based on the automated reports that States generate. *Id.*, § 342(a)(3), 110 Stat. 2233. Thus, it is impossible for a federal court to find a State to be "out of compliance" with new laws that may not become effective for another two years and when the compliance measurement has not yet been developed.

If Respondents are correct that the Reconciliation Act materially changed the landscape of child support enforcement, then their Complaint has become moot and is no longer ripe. Any allegation of past violation and injury is moot

because, according to Respondents, the law that this Court must apply has subsequently changed dramatically. Any demand for future compliance is no longer ripe because Arizona has not had the chance to "prove itself" under the new law, let alone been found to be "out of compliance" with its relevant requirements.

If this Court's review has been "prevented through happenstance" by Congress's enactment of the Reconciliation Act, "the established practice of the Court in dealing with a civil case from a court in the federal system which has become moot . . . pending [its] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss" the Complaint. *Munsingwear,* 340 U.S. at 39-40. *See also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 n.3 (1994) (Court "stand[s] by *Munsingwear's* dictum that mootness by happenstance provides sufficient reason to vacate").

CONCLUSION

This Court should deny Respondents' Motion. Alternatively, if the Court finds that summary disposition is appropriate at all, it should vacate the Ninth Circuit's decision and remand with directions to dismiss the Complaint.

Respectfully submitted,

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APPENDIX A

Respondents' Motion attaches an Appendix supposedly highlighting the "Pertinent Changes Made by the [Reconciliation Act]." Contrary to Respondents' contentions that the Reconciliation Act changed Title IV-D so materially that this Court cannot decide this case, the Reconciliation Act actually retains the requirements that Respondents questioned. A comparison of their allegations with the facts dispels their contention about "material" changes:

Respondents' Contentions	The Facts
The Reconciliation Act "eliminates" the requirement in 42 U.S.C. § 602(a)(27) that a State must "operate[ ] a child support program in substantial compliance with such a plan." Mot. App. at 1; *see also id.* at 2 (the Reconciliation Act "does not contain the 'substantial compliance' language of the analogous section in the prior statute, 42 U.S.C. § 602(a)(27)").	A State's IV-D program still must "substantially comply" with the requirements of Title IV-D. *See* Act, 110 Stat. 2145.
"The audit and penalty provisions limiting Parts IV-A and IV-D have been changed" (*id.* at 3), including "the exclusion of any cross-reference to the pertinent penalty provisions of Part IV-A." *Id.* at 6.	A program audit still must be conducted no less than once every three years. In the event the Secretary's audit determines that a State's IV-D program is not substantially complying, the penalties that can be

assessed remain the same: they are assessed against the Title IV-A program and using the same sliding scale that existed before: 1-2%, 2-3%, 3-5%. *See* Act, 110 Stat. 2146.

"The original welfare reform bill introduced in the 104th Congress had continued . . . statements" about individual recipients of Title IV-D services not being entitled to such services, citing H.R.4, § 302, 104th Cong. 1st Sess. (January 4, 1995). Mot. App. at 2-3.

Respondents' observation is meritless. First, the language that Respondents cite came from a completely different bill (H.R.4, which was never signed into law) rather than to the bill Congress ultimately enacted, H.R. 3734 (the Reconciliation Act). Second, a committee deleted that provision without comment before the entire Congress could consider and take action on the provision, thus rendering it meaningless. *See e.g., Trainmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) ("interpretation of statutes cannot be made to rest upon mute intermediate legislative maneuvers"). Third, the "pointed failure" rests with Respondents for not convincing Congress to add language in Title IV-D showing "unambiguously" that Congress intended that States would bear § 1983 liability.

In Title IV-D, (before the Reconciliation Act), "[s]ubstantial compliance was defined as full compliance . . . ." Mot. at 3a.

Not true. Title IV-D, both pre-and post-Reconciliation Act, leaves it up to the Secretary of Health & Human Services to define the term "substantial compliance." Compare 42 U.S.C. § 654(13) with Reconciliation Act 316(g)(1)(B), 110 Stat. 2218 (to be codified at 42 U.S.C. § 654(13). To date, the Secretary has chosen to define it at a 75% rate, not "full" (as in 100%), as Respondents suggest.

The "$50 'pass through' payment is eliminated in the Reconciliation Act." Mot. at 9a.

True, but insignificant. Before the Act, States had to pass through to the custodial Title IV-A parent the first $50 received each month in child support payments (while retaining the rest to reimburse the State and federal government for the costs of the child support program). The Act's elimination of this requirement (allowing the governments to retain all child support payments for Title IV-A recipients) does not affect the Ninth Circuit's decision, which did not rely upon this provision, – and indeed, barely mentioned it because it applied to the claim of only one of the five Respondents. *See* Pet. App. at 3a, 5a-7a, 30a-31a.

No. 95-1441

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,
Petitioner,

v.

CATHY FREESTONE, SUSAN HARRINGTON, SONYA MADRID, JUDITH ROGERS and ESPERANZA LAUSTANAU, individually, on behalf of their minor children and on behalf of all persons similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, INDIANA PROSECUTING ATTORNEYS COUNCIL, TENNESSEE DISTRICT ATTORNEY GENERAL CONFERENCE, AND WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS, IN SUPPORT OF THE PETITIONER

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STATEMENT OF THE INTEREST *

The National District Attorneys Association (NDAA) is an organization comprised of District Attorneys and Prosecuting Attorneys from all fifty states, practicing both

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* Counsel for both petitioners and respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

in the criminal and civil fields. The other *amici* are similar state organizations.

Each *amici* contains member attorneys who practice in the area of child support establishment and enforcement under Title IV-D of the Social Security Act. Those attorneys attempt to confer the benefits of paternity on children born out-of wedlock, to locate absent parents who hide from their moral and legal obligation to their children, and to establish and enforce child support orders so that single parent families do not have to rely upon public assistance to survive. The responsibilities of attorneys practicing under Title IV-D continue to grow with the divorce rate and the rate of out-of-wedlock births. *Amici* are also well aware of the numerous and varied obstacles which prevent one hundred percent success in their endeavors.

Amici are practitioners working daily "in the trenches," attempting to attain the goals set by Congress and the Secretary under Title IV-D. The concern they share stems from the their understanding that by upholding the Ninth Circuit, this Court will subject these advocates to unwarranted litigation, diverting their attention from child support enforcement to lengthy and complex court proceedings. *Amici* believe that these lawsuits will undermine their efforts and subvert the purpose of Title IV-D itself.

SUMMARY OF ARGUMENT

This Court, in *Maine v. Thiboutot*, 448 U.S. 1 (1980), granted individuals the right to bring an action under 42 U.S.C. § 1983 (hereinafter § 1983) for a violation of federal law, statutory or constitutional. Almost immediately, however, this Court, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), limited the broad scope of *Thiboutot*, carving out two exceptions to that rule. In order to bring an action under § 1983 after *Pennhurst*, a potential plaintiff must prove that (1) Congress created enforceable rights in the relevant federal

statute, and (2) Congress has not foreclosed private enforcement in the enactment of the statute.

An examination of this Court's jurisprudence on this issue, including the cases decided subsequent to *Pennhurst*, illustrates its hesitation to expand the use of § 1983 outside its traditional arena of civil rights legislation. This Court should restrict the use of § 1983 as a private remedy and hold that Title IV-D does not create enforceable rights in its participants, and that by enacting a comprehensive remedial scheme overseen by the Secretary of Health and Human Services, Congress intended to foreclose private remedies under Title IV-D.

Also at issue are the doctrines of federalism and separation of powers. The Ninth Circuit has created in itself the power to supersede the authority expressly granted to the Secretary of Health and Human Services by Congress, and to interfere in matters traditionally left to the States. This Court should recognize that many states, including these *amici* states, have contracted with an elected County Prosecutor or District Attorney to provide Title IV-D child support services in their county or locality. In doing so, these States have afforded the Title IV-D participants a political remedy as well, a remedy heretofore unmentioned by the lower courts.

Most importantly, by accepting the ruling of the Ninth Circuit Court of Appeals, this Court will place at risk the effectiveness of the entire IV-D program. By failing to address the issues of overall cost effectiveness and allowing time consuming, complex, costly and duplicative litigation, the Ninth Circuit has subverted the goals of the Title IV-D program. The inevitable result of requiring that both money and manpower used for implementing child support services be channeled into legal defense will clearly be seen in the substandard quality of the services and the staff, which can then only lead to more litigation. This Court needs to recognize the tremendous interests at stake in this lawsuit, and act to limit the authority that

the federal judiciary in attempting to usurp, in an apparent effort to micromanage State and local child support programs, which, in fact, will work to the detriment of the programs the federal judiciary is purporting to reform.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS FAILED TO PROPERLY CONSIDER THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL AND HOSPITAL v. HALDERMAN*, 451 U.S. 1 (1981), IN HOLDING THAT TITLE IV-D PARTICIPANTS CAN BRING A PRIVATE CAUSE OF ACTION AGAINST THE TITLE IV-D STATE AGENCY.

A. This Court Has Limited the Use of 42 U.S.C. § 1983 as a Private Cause of Action in Areas Outside the Traditional Arena of Civil Rights Violations.

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court expanded the application of 42 U.S.C. § 1983, interpreting the phrase ". . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." to include both federal statutory and constitutional laws. The Court found that the plain language of the statute mandated the inclusion of federal laws outside the traditional realm of civil rights or equal protection claims.

Justice Powell, dissenting in *Thiboutot*, predicted that the "practical effect of the decision" would be the imposition of liability on state and local governments and officials when a person "believes he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights." 448 U.S. at 22. The dissent enumerated the various entitlements and federal grants that now might create § 1983 plaintiffs, commenting that although it couldn't foresee the "number of new filings in our already overburdened courts . . . no one can doubt that these consequences will be substantial." *Id.*

Since *Thiboutot*, this Court has heeded Justice Powell's warnings and has redefined and limited the situations in which this type of private remedy may be used. Only one term later, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court created two exceptions to the *Thiboutot* ruling. The Court held that in order to bring a § 1983 action, a court first must determine whether the statute at issue created "enforceable rights" under § 1983, and second, whether Congress had foreclosed a private right of action in the statute itself. *See also Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981).

The *Pennhurst* majority also discussed federal laws enacted under the authority of Congress' spending power, likening such legislation to a contract between the States and the federal government. In order to receive federal funding, the States agree to comply with the conditions present in the legislation.

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17.

The Court, therefore, looked to whether Congress had enumerated the States' responsibilities under the contract in mandatory or precatory terminology to determine whether the States had agreed in their contracts with the federal government to be subject to the private remedy of 42 U.S.C. § 1983.

More recently, this Court has discussed these two exceptions to the use of 1983 in *Wilder v. Virginia Hospital Associaiton*, 496 U.S. 498 (1990) and *Suter v. Artist M.*, 503 U.S. 347 (1992). In *Wilder*, this Court addressed the use of § 1983 in the context of the Boren Amendment

to the Medicaid Act requiring the States to formulate a medical assistance plan which provided for reimbursement of various medical services through the use of rates which are "reasonable and accurate to meet the costs which must be incurred by efficiently and economically operated facilities." The plan had to be submitted to and approved by the Secretary of Health and Human Services ("Secretary").

The Court, in *Wilder*, formulated a three-part test in determining whether or not a statute creates rights enforceable under § 1983. The inquiry, according to the Court,

> turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.' If so, the provision creates an enforceable right unless it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.'

496 U.S. at 509.

The *Wilder* Court held that the Boren Amendment imposed a "binding obligation" on the States to adopt reasonable and adequate rates of repayment which gave rise to rights enforceable by the health care providers. The Court found the controlling factor to be the "mandatory rather than precatory language" of the Boren Amendment. 496 U.S. at 510. The Court also rejected the Petitioners' argument that Congress had foreclosed enforcement of the Medicaid Act by private remedy, citing this Court's decision in *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987).

In *Wright*, the Court concluded that the "generalized powers" of the Department of Housing and Urban Development (HUD) to audit and cut off federal funds were insufficient to prove Congressional intent to foreclose private remedies under § 1983. The Court noted that HUD chose to exercise its audit power very infrequently, and that no mechanism existed to bring individual problems to HUD's attention. In light of *Wright*, the Court in *Wilder* held that the lack of an appropriate remedial scheme as well as the limited role of the Secretary under the Boren Amendment, demonstrated Congress' intent to allow a private right of action to enforce the statute.

Two years after *Wilder*, the Court addressed the *Thiboutot* ruling in *Suter v. Artist M., supra.* In *Suter*, the Court addressed the Adoption Assistance and Child Welfare Act of 1980 ("Adoption Assistance Act" or "Act") which established a federal reimbursement program for expenses created by the States' administration of foster care placement and adoption services. To qualify for reimbursement, the States had to submit a plan to the Secretary for approval, and under the plan, the States had to make reasonable efforts prior to the placement of the child in foster care to prevent or eliminate the need to remove the child from the home.

The Court focused on the word "reasonable," which was used both in the Boren Amendment and in the Adoption Assistance Act, but differentiated between the usage in both statutes. Under the Boren Amendment, Congress required the States to enact a plan containing reasonable and adequate rates of reimbursement, and the Court found guidance in both the statute and the regulations regarding methods of calculating reasonable rates. The use of the word "reasonable" in the Boren Amendment, therefore, in no way impacted the mandatory duties of the States to formulate the reimbursement plan.

"Reasonable efforts" in the Adoption Assistance Act, however, was not qualified by any further statutory guidance. The only requirement Congress placed on the States was to submit a plan to the Secretary containing sixteen features listed in the statute. The States, therefore, were left with broad discretion to act on a case by case basis.

Because the States were granted these broad limits, the Court held that the language "reasonable efforts" did not confer upon private individuals any enforceable rights. 503 U.S. at 359, 360.

The *Suter* Court also discussed the enforcement mechanisms of the reasonable efforts clause in place in the Adoption Assistance Act, including the authority invested in the Secretary to reduce or terminate payments to a State for failing to properly administer its plan, or upon a finding that the State's plan no longer conformed with the statutory requirements. Because the Court had already held that no enforceable rights existed in the Act, the Court did not rule on whether Congress had foreclosed remedies under § 1983. The Court did determine, however, that "the absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter." 503 U.S. at 360, 362.

Subsequently, Congress enacted an amendment in apparent disagreement with *Suter*. In 42 U.S.C. § 1320(a), Congress amended Title XI of the Social Security Act, stating that any action brought to enforce a provision of the Social Security Act:

> is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan. . . . This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability.

Although this amendment seemingly manifests Congress' desire to return to pre-*Suter* principles, the amendment is not intended to expand the availability of private remedies any further than already done by this Court. This amendment, therefore, has little bearing on this Court's refusal to allow a private right of action in the instant case, as *Suter* relied on the preceeding cases to

which Congress desires a return. *Suter* simply utilized the guidelines already established by this Court, applied them to the statute at hand, and concluded that, under those guidelines, no enforceable rights exist.

The Congressional amendment should have no impact on this Court's decision to deny a private right of action to Title IV-D participants. Applying the guidelines and tests formulated by this Court since *Thiboutot* it remains clear that the absence of a private remedy under Title IV-D does not render the statute a "dead letter."

B. The Ninth Circuit Erroneously Held That Title IV-D Creates "Enforceable Rights" in Its Participants.

The Ninth Circuit Court of Appeals, in the decision below, misinterpreted the Social Security Act in determining that it does confer enforceable rights upon Title IV-D participants. Although the court recognized that *Suter* and *Wilder* potentially conflicted, the court concluded that *Suter* represented an "elaboration and amplification of the *Wilder* test rather than an unannounced and unacknowledged departure," and read *Suter* "as the Court's effort to provide additional guidance on what is a 'binding obligation' and when an asserted interest may be judicially enforceable." 63 F.3d at 1148. Because the court relied on *Wilder*, and failed to adequately consider the implications of *Suter* to the instant case, the court mistakenly held that the Social Security Act creates enforceable rights in the Title IV-D participants.

Judge Kleinfeld, dissenting in *Freestone*, accurately and concisely recognized that the instant matter is distinguishable on its facts from Wilder. Judge Kleinfeld noted that *Wilder* involved money paid directly to the private health care providers, not to the state governments. Also, unlike Title IV-D, the Boren Amendment only allowed the Secretary limited oversight, leaving the hospitals with no assurance that the reimbursement rates would be reasonable or adequate. The Boren Amendment

"places the responsibility for the development of reasonable and adequate payment rates with the States." 496 U.S. at 507 (citing 48 Fed. Reg. 56047 (1983)). The Secretary, therefore, merely reviewed the States' assurances that they had formulated reasonable rates, but did not require that the States submit the actual findings or underlying data.

In the case of the Title IV-D program, "substantial compliance" requires the State to meet the standards set forth in the regulations in 75% of the State's cases. As Judge Kleinfeld accurately submits, "even if the State substantially complied, one out of four custodial parents would find herself or himself within the unfortunate 25%." 68 F.3d at 1158. Because of this, there is no way for the Court to determine that the Social Security Act conferred enforceable rights upon all custodial parents receiving Title IV-D services, as Congress recognized that not all Title IV-D participants would receive adequate services.[1]

The majority in *Freestone* skirted the issue of whether substantial compliance would preclude an individual remedy against a IV-D agency. 68 F.3d at 1151. The dissent in *Freestone*, however, expressly recognized that a sub-

[1] This Court's recent discussion of the issue of standing in *Lewis v. Casey*, 517 U.S. —— (1996), also illustrates this point. Writing for the majority, Justice Scalia takes issue with Justice Stevens' dissenting conclusion that the named plaintiff's injuries were sufficient to overcome any constitutional challenges to the standing of the class. Justice Scalia opines, "standing is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is, of course, not the law."

In the instant case, standing was dispensed in gross, and the plainitffs were given the right to complain about all administrative deficiencies in the Title IV-D program, regardless of the individual's particular grievance.

stantial compliance standard allows for less than perfect performance. Indeed, Congress has recognized that success in every case is virtually impossible due to the plethora of variables involved in each individual case.

Congress' intentions are enumerated in the Senate Report accompanying the passage of the amendments to Title IV-D in 1984, which declared:

> In establishing standards of effectiveness, a reasonable degree of flexibility is essential. Based on the experience in the program to date, it should be possible to set standards which represent minimum acceptable levels of success in carrying out the various objectives of the child support program.

S. Rep. No. 98-307 (1984) at p. 32. *Also*, 4, 1984 U.S.C.C.A.N 2397 at 2428

The standards defining substantial compliance have been adopted by the Office of Child Support Enforcement as 90 percent compliance with case opening and closing procedures (45 CF.R. § 305.20(a)(2)) and 75 percent compliance in operations (45 C.F.R. § 305.20(a)(3)).[2] The 75% substantial compliance standard raised criticism from some who felt that the standard resulted in many cases going untouched as the States could circumvent their responsibilities by taking some nonsubstantive action in 75% of their cases. The response stated that the critics held:

> a misunderstanding of Federal Title IV-D requirements which require States to take appropriate action in all cases referred for and applying for program services. Requirements for providing and accepting applications and closing cases are clear-cut, definitive, and follow specific steps. They are in the nature of administrative activities, distinguishable from ac-

[2] *See, Child Support Enforcement Program: Paternity Establishment and Revision of Child Support Enforcement Program and Audit Regulations*, 59 Fed. Reg. 66204 (December 23, 1994).

> tivities connected with providing services which are more complex and which permit greater flexibility and discretion. . . . For over ten years, [the Office of Child Support Enforcement] has used a 75 percent standard to determine States compliance with Federal program requirements. The standard has proven to be a reasonable expectation of the level of State performance in providing program services.

59 Fed. Reg. 66243.

Judge Trott, dissenting in *Withrow v. Concannon*, 942 F.2d 1385, 1390 (9th Cir. 1991), directly confronted the crticisms leveled at the substantial compliance standard, stating that the standard

> is not an invitation to the states to perform their duties in a haphazard fashion or in bad faith. It is a stringent yet understanding standard that requires the best of an agency under the circumstances.

Id.

In *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir. 1989), the Eleventh Circuit Court of Appeals held that Title IV-D does not create enforceable rights in its participants, basing its holding largely on the legislative intent in enacting Title IV-D of the Social Security Act.[3] Citing the applicable Congressional Committee report, the Court determined that the primary concern addressed by the Title IV-D program was "collecting child support

[3] *Wehunt* relied upon the four prong test enumerated by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975) to determine whether a statute created a private right of action within the statute itself. The Court looked at the following factors: 1) is the plaintiff "one of the class for whose especial benefit the statute was enacted"; 2) is there any indication of legislative intent to create or deny a private remedy; 3) is a private remedy consistent with the underlying purposes of the statute; and 4) is the cause of action "traditionally relegated to statute law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." The *Wehunt* Court focused on the second prong.

in order to reduce the welfare rolls." 875 F.2d at 1565. The Court opined that the reading of the report lead to the conclusion the goal of Title IV-D was to immediately lower the cost to the taxpayer as well as to lessen the number of families enrolling in welfare in the future—benefits to society as a whole rather than specific individuals. *Id.*

The Court also looked at the nature of the relationship between the Title IV-D agency and the program's participants. Because custodial parents who receive AFDC are required to participate in the program, and assign their rights to the State, they are giving the States the opportunity to "recoup the financial drain imposed by the welfare system on the state and federal treasuries." In this way, Title IV-D benefits the entire community by "diminishing the welfare outlay," and, therefore, creates no right of private action in the individual Title IV-D participants.

C. Congress Did Not Intend for Title IV-D Participants to Bring Private Remedies Under § 1983, as It Had Foreclosed Such Rights by Enacting a Comprehensive Remedial Scheme in the Statute Itself.

Although *Suter* did not address the second exception to the *Thiboutot* holding enumerated in *Pennhurst*, the *Freestone* majority again mistakenly relied on *Wilder* and *Wright*, *supra* in holding that Congress did not intend to foreclose a private remedy in Title IV-D of the Social Security Act.

In *Wright*, this Court held that the remedial scheme in the Brooke Amendment to the Housing Act was insufficient in itself to prohibit a private cause of action under § 1983.[4] To the contrary, the role of the Secretary under

[4] The remedial scheme set forth in the Brooke Amendment is much weaker than that found in Title IV-D. Congress, in the

Title IV-D is much more expansive than in both the Boren Amendment and the Brooke Amendment. In all three enactments, Congress invested in the Secretary the power to withhold funds from the States for noncompliance.

Title IV-D, however, creates in the Secretary a mandatory, proactive role in overseeing the states' IV-D agencies by requiring an audit every three years, "designed to determine whether State child support enforcement programs operate in conformity with Federal law and regulations." 59 Fed. Reg. 66240. If, after an audit, the Secretary determines that corrective measures are necessary, the Secretary must then perform an annual audit to monitor compliance with the corrective plan. Because the Secretary is mandated to provide such extensive oversight, Congress' exclusion of a private remedy in Title IV-D does not render the "substantial compliance" clause a "dead letter." 503 U.S. at 361.

An alternate remedy also exists aside from those provided by the Secretary, enhancing the remedial plan set forth under Title IV-D itself. In the Federal Register, the Administration for Children and Families provided assurance that its regional offices will monitor compliance with the Title IV-D requirements "through program and financial reviews and the State plan approval process." 59 Fed. Reg. 66212.

The Sixth Circuit reached the same conclusion in *Carelli v. Howser*, 923 F.2d 1208 (1991). There the court held

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Brooke Amendment, granted the Department of Housing and Urban Development (HUD) the authority to audit the States' Public Housing Authorities (PHA) to monitor compliance with the statute. HUD, however, refused to audit frequently, relying on its handbook, which only requires an audit every eight years. No other mechanisms exist to enable HUD to effectively oversee the performance of local PHA's. In one regulatory amendment, HUD was even relieved of its duty to approve the PHA's annual utility allowance schedules before the effective date of those schedules.

that while Title IV-D did create enforceable rights for its participants, Congress had foreclosed a private right of action in the Social Security Act by enacting a thorough remedial scheme in the statute itself. The Sixth Circuit reversed and remanded the District Court's denial of the State of Ohio's motion to dismiss, finding that Congress had enacted within the Social Security Act a remedial enforcement mechanism comprehensive enough to foreclose any private causes of action under § 1983.

After reviewing the regulations governing the Secretary's auditing requirements, the Court determined that Congress did not intend the federal judiciary "to occupy the same ground at the same time and in the same manner as the Secretary." 923 F.2d at 1216. The court also noted that each member of the class involved in the suit had other private legal remedies available for securing child support enforcement or obtaining any of the other services mandated under Title IV-D.

D. Other Lower Court Rulings Granting a Private Remedy to Title IV-D Participants Under § 1983 Can Clearly Be Distinguished on Their Facts.

The Ninth Circuit cited other lower court rulings which have upheld the right of Title IV-D participants to commence a 1983 action against a state's Title IV-D agency. These other cases, however, can be distinguished on their facts.

The Eighth Circuit Court of Appeals, in *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), held that a custodial parent may bring a private cause of action under § 1983 for violations of the Title IV-D mandates. In *Howe*, the plaintiffs filed a class-action lawsuit against the State of South Dakota for its refusal to extend Title IV-D services to custodial parents when the absent parent resided on an Indian reservation. The State reasoned that the jurisdictional barriers presented by the Indian tribal courts made paternity establishment and child sup-

port enforcement virtually impossible. The court held, however, that Congress did not intend for an entire class of citizens to be excluded from the Title IV-D program, and therefore, allowed the custodial parents a private right of action.[5]

In *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir. 1993), the First Circuit Court of Appeals noted that *Suter* appeared to depart from the § 1983 framework set forth in *Wilder*, but then concluded that *Suter* actually "left the basic *Wilder* framework intact, but added a further threshold inquiry, applicable in cases involving federal-state funding statutes enacted pursuant to the 'Spending Clause.'" 7 F.3d at 263. The argument enumerated by the First Circuit is illogical on its face. As both *Wilder* and *Suter* involved federal-state funding statutes enacted pursuant to the Spending Clause, the court's claim that *Suter* enhanced *Wilder* instead of limiting it, contravened its own recognition that, while the *Suter* Court did not overrule any previous cases, it did weaken earlier § 1983 precedents, including *Wilder*, "in certain important respects."

Although *Albiston* held that a custodial parent could bring a private action under § 1983 for a violation of the Title IV-D mandates, the case revolved around an issue

[5] *Howe* involved a much more limited situation than that confronted by the Ninth Circuit. In South Dakota, if an absent parent resides on an Indian reservation, the Title IV-D agency attempts to procure a stipulation of paternity and an appropriate child support award. The state courts, however, lack jurisdiction over residents of the reservations, making it impossible to pursue the absent parents in the state courts. The State may use the tribal courts to bring the paternity actions, but the federal government does not provide matching funds for actions taken in those courts. By being forced to pursue absent parents in the tribal courts, the state has no control over whether the proceedings are violative of Title IV-D. If they are, the Secretary may then withhold funds from the state even though it is attempting to comply with the order of the Court of Appeals.

distinct from the matter at issue in this litigation. In *Albiston*, the Court was presented with claims by custodial parents that their "gap" and "pass-through" checks were not being disbursed in a timely fashion. The Court, therefore, was not faced with the issue of whether the custodial parents were entitled to bring a private cause of action against the State for failing to meet the Title IV-D enforcement standards. The custodial parents in *Albiston* had already received child support enforcement, and were entitled to the $50.00 per month "pass-through" from the support which had been paid by the absent parent. Every case in which a noncustodial parent paid his or her child support created a custodial parent with a right to collect a "gap" check and a "pass-through" check within a reasonable time frame. There is no regulation in that section of Title IV-D which allows the State to disburse the "gap" and "pass-through" checks in 75% of the cases, and that particular regulatory language is "specific, definite and mandatory." 7 F.3d at 265.

II. PRINCIPLES OF FEDERALISM AND STATE SOVEREIGNTY PRECLUDE A § 1983 ACTION BROUGHT BY PARTICIPANTS IN THE TITLE IV-D PROGRAM.

A. The Area of Family Law Has Traditionally Been Left to the States.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court promulgated a four-part test to aid lower courts in determining whether a statute created a private right of action within the statute itself. *See, supra* note 3. The last factor in the Court's test was whether the cause of action "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78. Although the second prong of the test has become the primary, dispositive factor, the others are "indicative of its presence or absence." *Thompson v.*

Thompson, 484 U.S. 174, 190 (1988) (Scalia, J. concurring) (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979)). Plaintiffs in the instant matter clearly cannot claim that the last prong of the *Cort* test has been satisfied.

Family law has long been a matter reserved for state courts. In *Thompson v. Thompson, supra*, the Court held that the Parental Kidnapping Prevention Act (PKPA) does not create a private right of action in the federal courts, but instead extended the Full Faith and Credit Clause to child custody orders. The Court, addressing the applicability of the PKPA to individual state court custody orders, stated that "[i]nstructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state law questions that they have little expertise to resolve." 484 U.S. at 186.

In the arena of child support enforcement, similar federal enactments exist through which Congress intended to extend full faith and credit to state child support orders. *See*, 28 U.S.C. § 1738(B) (1994), Full Faith and Credit for Child Support Orders. In passing this law Congress recognized the difficulties inherent in interstate child support enforcement. Like the PKPA, however, Congress did not intend for the federal judiciary to play a role. If Congress had intended to federalize area of family law, it could have done so in statutes like the PKPA or 28 U.S.C. § 1738(B). In passing a law to aid states in the enforcement of their own laws concerning the family, Congress did not include intervention by the federal courts.

Congress also drafted the Uniform Reciprocal Enforcement of Support Act (URESA) and the Uniform Interstate Family Support Act (UIFSA) in order to facilitate interstate child support enforcement by Title IV-D agencies to aid States in complying with 42 U.S.C. § 666 mandating that the States adopt procedures to give full

faith and credit to orders of other States. To accomplish this result, the majority of states have enacted the federal UIFSA model, although some do still perform services under the URESA or RURESA (Revised URESA). The Welfare Reform legislation pending before Congress mandates that the States enact UIFSA.

The States retain remedies within UIFSA. The Act contains the specific duties of the Title IV-D agency. If the Title IV-D agency is neglectful in the administration of its duties or refuses to provide IV-D services, the Attorney General or other agency may direct the agency to perform its statutory duties or perform the services itself directly to the individual.[6] By including this remedial provision in the UIFSA statute and RURESA, Congress affirmed its intentions to keep the federal courts out of the business of child support enforcement.

By including this remedial provision in UIFSA, along with the remedial scheme in Title IV-D itself, the states have affirmed their intentions to retain jurisdiction over the issue of child support enforcement. If Congress adopts the Welfare Reform legislation, it will have taken a position inconsistent with one which would allow federal courts' control over this important area of law.

B. Many States Have Afforded a Political Remedy to Individual Title IV-D Participants Inherent in the Creation of the Title IV-D State Agencies.

States possess a fundamental right to be self-governing. Inherently included in the states' self-determination is a remedy not yet addressed by the courts. Under the Tenth Amendment, States have authority over all functions not expressly prohibited to them or expressly granted to Congress in the Constitution. The States, therefore, create

[6] UIFSA § 308. This section is similar to RURESA § 18(c) which gave the State Attorney General, or other designated agency, oversight responsibility and the power to seek compliance with the Act.

their individaul governments and government agencies, and regulate the manner in which each branch or agency of their governments will function.

Included in the agencies created by the states is each state's Title IV-D agency. The *amicus curiae* state organizations involved in this endeavor have created their Title IV-D agency in consultation with or under their individual offices of the Prosecuting Attorney or District Attorney. The county Prosecuting Attorney or District Attorney in each of these states is an elected official, which, by definition, provides a very obvious remedy. Participants in these, and many other states have an effective political remedy at their disposal each election year. If the participants are dissatisfied with their enforcement or establishment services, they can act on their dissatisfaction and vote the current Prosecuting Attorney or District Attorney out of office.

C. By Allowing a Private Right of Action, the Ninth Circuit Created an Impermissible Infringement on State Sovereignty by the Federal Judiciary.

The Sixth Circuit Court of Appeals, in *Carelli v. Howser, supra,* provided a concise analysis of the conflict between the traditional concepts of federalism and a private right of action under 1983. Citing Justice Powell's dissent in *Maine v. Thiboutot, supra,* the Sixth Circuit concurred with his opinion that the *Thiboutot* majority had created " 'a major new intrusion into State sovereignty under our federal system.' " 923 F.2d at 1213. The *Carelli* court, guided by Justice Powell's warning, undertook a determination of "just how far such an intrusion should be carried." The court concluded that:

> [T]he nature of the relief sought by plaintiffs here would cause a federal court to carry out an oversight function beyond that intended by Congress given the comprehensiveness of the remedial scheme provided in the statute.

Id.

The holding of the Ninth Circuit extends the intrusion into State sovereignty by allowing the federal judiciary to rule on matters intended to be overseen by the Secretary, an agent of the executive branch of government. Although some federal oversight of the "contract" between the States and the federal government created pursuant to Congress' spending power is necessary, that oversight should be limited. Further intrusion involves the federal government dictating the manner in which state prosecutors should be doing their jobs, a function which should be left in the hands of the citizens of the states through the exercise of their right to vote.

This Court recently ruled on the issue of state sovereignty in *Lewis v. Casey*, 517 U.S. —— (1996). *Lewis* involved the constitutional right of access to the courts and the ability of the federal courts to reform state prison systems upon a finding that state prisoners are not afforded that right.

Writing for the majority, Justice Scalia addressed the District Court's appointment of a special master to formulate a plan for reform, and explained that various manners in which the District Court impermissible infringed upon the State's authority. Justice Scalia briefly discussed the injunction issued by the District Court, calling it "inordinately—indeed, wildly—intrusive." Because this was so obviously unacceptable, Justice Scalia chose not to "belabor the point." 517 U.S. at ——.

This Court also noted that the special master "failed to give adequate consideration to the views of the State prison authorities." In doing so it rejected the:

> [S]trong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct errors made in the internal administration of their prison.

Id.

The Court in *Lewis* also recognized the inherent violation of the separation of powers, discussing the blurring of the lines between the judicial and executive branches in lawsuits involving a government agency that has been allegedly mismanaged.

> Of course the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly.

Id.

This Court, in *Lewis*, strongly expressed its disapproval of the micromanagement of state programs by the federal district courts. By allowing Title IV-D participants to bring a private cause of action under § 1983, this Court will invite the very same micromanagement it repudiated in *Lewis*. The Ninth Circuit, in *Withrow v. Concannon*, 942 F.2d 1385 (9th Cir. 1991), provides an example of the extremes to which federal courts will sanction interference into state programs.

In *Withrow*, the court transformed the 75 percent "substantial compliance" standard into a nullity, defining it as the point at which the federal government withholds funding from the States. The court held that the "regulations require compliance, not 'substantial compliance.'" 942 F.2d at 1388. The only point at which the Court of Appeals felt that the District Court had the equitable discretion to deny injunctive relief was when any failure of total compliance was "truly *de minimus*, where the state has come to comply 'as strictly as is humanly possible.'" The State, therefore, must eliminate all but "the

truly inevitable instances of non-compliance." 942 F.2d at 1389.

If this Court allows a private right of action, and a one hundred percent standard is invoked by the federal courts, the Title IV-D program will be thrust into a hopeless situation. The slippery slope of the Ninth Circuit's ruling leads to a tremendously inefficient Title IV-D agency. A logical requirement of the "everything humanly possible" standard includes forced appeals of every unsatisfactory decision by the trial judges, thereby expanding the responsibilities of the state agency to a truly unmanageable level.

In his dissent, Judge Trott discussed his biggest concern with the majority's "misguided no-harm no foul rationalization," stating that it is

> inappropriate to tie the hands of a district judge called on to exercise discretion in deciding whether the equitable remedy of injunction is called for in these cases. An agency must be virtually perfect regarding the requirements in question, or it becomes subject to an injunction with all its attendant burdens.

942 F.2d at 1390.

According to Judge Trott, the courts instead need to be aware and "thus make some allowance for the difficulties of administering an extensive bureaucracy." *Id.*

III. UPHOLDING *FREESTONE v. COWAN* WILL PRODUCE A CHILLING EFFECT ON THE WORK OF THE TITLE IV-D AGENCIES AND LEAD TO A DRAMATIC DECREASE IN CHILD SUPPORT ENFORCEMENT AND ESTABLISHMENT.

The Sixth Circuit Court of Appeals in *Carelli v. Howser, supra*, discussed the various problems inherent in allowing a § 1983 lawsuit to be brought against a state IV-D agency. The first problem, according to *Carelli*, is that any remedial action taken by the Secretary under

Title IV-D is statewide. In *Carelli*, and in other states where a Prosecutor or other country attorney has contracted with the state to locally administer the child support program, lawsuits have been brought against certain counties [7] and the state agency, but not the Secretary. By entering an order regarding corrective action to be undertaken only by those counties, the potential exists for the court's order to contradict the Secretary's findings, thereby creating an administrative nightmare.

The *Carelli* court also foresaw a major problem stemming from the makeup of the class itself. The class certified by the District Court in *Carelli* consisted of all persons currently eligible and eligible in the future for child support services in the two counties involved in the lawsuit. As the court pointed out, "the majority of the class members so identified are receiving child support services." 923 F.2d at 1216 n.13. The court correctly recognized that many of the custodial parents who do not receive services are those who:

> [C]annot or will not supply any information on the whereabouts of delinquent support obligors or putative fathers. All they can say is that the state should try harder to find them—a very nebulous concept on which to base relief.

923 F.2d at 1216.

Most importantly, *Carelli* illustrated the plaintiffs' lack of deference to cost effectiveness when requesting appropriate remedial action. Although some of the lower courts have allowed plaintiff's request for relief under § 1983, it is the courts who are most ill-equipped to make a determination of cost effectiveness consistent with the normal operations of a state's Title IV-D agency.

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[7] *See, e.g., Linda Young et al. v. Eloise Anderson, Director, California Dept. Of Social Services, in Her Official Capacity, Daniel Lundgren, Attorney General, Michael Ramsey, Butte County District Attorney, in His Official Capacity, and County of Butte,* EDCal No. CIV-S-95-942LKK/JFM.

First, as mentioned above, the courts have dealt with these actions on a county-wide, rather than a state-wide basis, creating a potential conflict with the Secretary's state-wide corrective plan. Pursuant to 42 U.S.C. § 653, the Secretary has created a unit trained to perform various audit functions over Title IV-D operations. The courts, on the other hand, have not obtained any particular training in the area of Title IV-D services administration. As stated in *Carelli*,

> What we envision happening would be an order coming from the court directing the State of Ohio to increase staff size, do a better job of establishing priorities and setting time limits for performing required tasks as well as responding to calls for service. In short, the court's order would address all the shortcomings the Secretary has already ordered corrected.

Id. (citations omitted).

The court, admitting that its illustration was an obvious over simplification, pointed out that even an order as limited as the one above "would require lengthy and complex hearings." 923 F.2d at 1216 n.10.

Second, the states, according to the regulations enacted pursuant to Title IV-D, are allowed to, and must, prioritize their cases. See 42 C.F.R. § 303.10. This prioritization is to be implemented "statewide or in a particular political subdivision of the State" in order to efficiently "manage its caseload." By enacting this section, the Secretary codified its acute awareness of the importance of cost effectiveness when administering Title IV-D services. As the Sixth Circuit noted: "We do not read the [Social Security Act] to require that a State spend $100 to collect $50." 923 F.2d at 1216 n.13.

Economically, it is unwise to allow two different authorities to determine corrective remedies for a State's IV-D agency. Title IV-D was enacted with the stated purposes of preventing families from relying on public assistance, and collecting the public monies expended on

families who could not remain self-sufficient without public assistance. Those goals will be unattainable if the Court upholds the use of § 1983 as a private remedy. A delicate balance of economic prioritization currently exists in the states' IV-D agencies, explicitly sanctioned by the Secretary. Allowing a federal judge to upset that balance will defer limited resources from what is essential, maintaining an effective child support program.

Economic prioritization must also occur among all social services performed by state agencies, a factor the courts will not consider when fashioning equitable relief. By requiring the Title IV-D program to exceed the standard set forth by Congress in the statute, all state programs are placed in jeopardy. Dissenting in *Withrow v. Concannon*, 942 F.2d 1385, 1390 (9th Cir. 1991), Judge Trott recognized the tremendous burden placed on state when the federal court became involved in the management of its social programs.

> It is folly in a time of shrinking revenues at the state level to believe that the expense of bringing these programs into virtually perfect compliance is insignificant. All over our nation, needed public services are being slashed and burned, yet a federal court now effectively eliminates a state's ability to control administrative costs for these programs.

Id.

By allowing lawsuits such as this to proceed, this Court will also be failing to recognize the tremendous effort and commitment put forth every day by those working in the state and local IV-D offices. As attorneys practicing under Title IV-D, *amici* understand the tremendous effort necessary to meet the standards set forth by Congress in the statute and regulations. It is a frequently frustrating and daunting task, in which attorneys and staff confront various obstacles which, among others, include custodial parents who refuse to cooperate in establishing paternity or collecting child support, responding states who relegate interstate enforcement cases to the lowest priority, ex-

tremely discontented IV-D participants who unleash their frustrations on the local staff who is attempting to provide legal services, extremely unmotivated noncustodial parents who refuse to work to support their children. By usurping the authority of Congress and the Secretary, the Ninth Circuit now wishes to add to that list of concerns the possibility of federal judicial oversight and micromanagement.

Attorneys and paraprofessional staff practicing under Title IV-D are committed to serving families, and particularly, children in need. Many of the attorneys and staff have participated in the Title IV-D Program since its inception in 1976. Should this Court uphold the Ninth Circuit, the commitment of these child advocates will be rewarded by subjecting them to unwarranted and cumbersome litigation in federal court, which could result in money judgments, findings of contempt or other negative sanctions. Although committed to child support enforcement, local officials will likely react to this specter of litigation by terminating their contracts with the state Title IV-D agencies. Based on the unrealistic expectations and generalized dissatisfaction of a handfull of custodial parents, the majority of custodial parents and children will lose the experience and commitment of many of the most experienced and knowledgeable attorneys and paraprofessionals in the Title IV-D Program. The affected states or localities will then be required to completely reorganize the local program, and the experienced and knowledgeable attorneys and staff will probably be replaced by new staff that is inexperienced and untrained in child support matters. This reaction will then likely lead to more § 1983 lawsuits by legal services organizations, and the quality of the child support services provided by the Title IV-D Program will begin a continual and inevitable downward spiral.

Amici have striven to meet the standards set forth in Title IV-D, and, as local District or Prosecuting Attorneys,

they understand all too well that the public health and welfare is more at risk every day those standards are not reached. Congress and the Secretary have determined that due to the aforementioned obstacles, perfection is impossible. Accordingly, Congress allowed for "substantial compliance" as opposed to "one hundred percent compliance." If a state agency does not meet the standards for substantial compliance, the Secretary will assist in devising a corrective action plan, and will then strictly monitor that plan through an annual audit, and, if necessary, monetary sanctions. By allowing IV-D participants to request that the courts play that role, the Ninth Circuit has effectively circumvented the goals of the IV-D program itself.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the opinion of the District Court should be affirmed.

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BLESSING,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN PUBLIC WELFARE ASSOCIATION AND THE NATIONAL CHILD SUPPORT ENFORCEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Pursuant to Court Rule 37, *amici curiae* respectfully submit this brief in support of Petitioner's request that this Court overturn the Ninth Circuit decision that, by creating a private right of action, would immobilize national child support enforcement programs and harm the children whom these programs serve. Consent to the filing of this brief has been granted by counsel for all parties and letters indicating such consent have been filed with the Clerk of this Court.

The American Public Welfare Association ("APWA") is a nonprofit, bipartisan organization of individuals and State and local agency administrators concerned with government human service programs. APWA's members include all State and many territorial human service agencies, more than 1,200 local and federal agencies, and several thousand individuals who work in or otherwise have an interest in government human service programs. APWA's National Council of State Human Service Administrators represents the interests of State IV-D program directors through its Child Support Enforcement Subcommittee. APWA's mission is to assist State human service directors in developing and implementing sound public welfare policy. As an organization of experts in this field, APWA submits this *amici curiae* brief to expose the practical, real world problems that the Ninth Circuit's decision both ignores and exacerbates.

The National Child Support Enforcement Association ("NCSEA") is a nonprofit association founded in 1952. Its mission is to promote and protect the well-being of children and their families through the effective enforcement of child support obligations. NCSEA's membership of more than 2,400 includes judges, court administrators, private and legal services attorneys, federal policymakers, social workers, child support enforcement caseworkers, family support councils, State and county child support agencies and probation departments, policy "think tanks" and child support advocates. Its membership also includes corporations which supply products and services that these individuals and entities need to ensure that children receive the support they deserve from both parents as efficiently and effectively as possible. NCSEA works with Congress and the federal Office of Child Support Enforcement to ensure passage and implementation of effective child support laws and regulations. It also serves as a training and educational organization for its members, offering training conferences and smaller seminars on a wide range of child support topics.

SUMMARY OF ARGUMENT

In *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995), the Ninth Circuit found that custodial parents could bring a class action suit under 42 U.S.C. § 1983 against the State of Arizona for services received through the State's child support enforcement ("CSE") program, administered under Title IV-D of the Social Security Act ("IV-D").[1] The Ninth Circuit's decision would entitle families receiving child support enforcement services from a State to sue the State for its performance in any phase of the child support enforcement ("CSE") program. This decision usurps a comprehensive oversight scheme that Congress put in place when it designed the program. It also thrusts federal courts into the middle of appropriation decisions made by State legislatures and the day to day minutiae of administering the IV-D program. The Ninth Circuit's decision also creates an unattainable expectation of perfect performance and perfect results by States in every case.

"Child support enforcement" is a deceptively simple phrase for a program that, in reality, calls for execution and repetition of a complex sequence of prerequisite activities, including locating absent parents, establishing paternity, establishing and enforcing child support obligations, and collecting child support payments currently due and back payments (or "arrears"). Like an intricate set-up of dominoes, complete success cannot be achieved unless each and every piece falls correctly into place, allowing the next step to go forward. Yet none of these activities can be performed in a vacuum, but must instead be conducted against a tide of burgeoning social problems (such as increasing numbers

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[1] In 1975, Congress responded to the growing number of parents failing to pay child support by creating the Child Support Enforcement Act in Title IV-D of the Social Security Act, 42 U.S.C. § 651-699. (Public Law 93-647). The 1975 legislation authorized federal matching funds to be used by States to help enforce support obligations of noncustodial parents by accomplishing a series of necessary activities. The program is often called simply "IV-D" in reference to the section number corresponding to its statutory placement in the Social Security Act.

of single parent families), and complexities related to interstate enforcement and the involvement of third parties (such as noncustodial parents and private sector employers unfamiliar with assisting in a public sector program) that make enforcement efforts even more difficult.

The Ninth Circuit decision fails to acknowledge the grim reality that, despite optimum processes and resources, Herculean efforts, and tremendous luck, it can still be impossible to collect child support from an alleged father, for whom only a first name is known, who has moved multiple times, and who, when finally discovered, is in prison with no income, has crossed jurisdictional lines, or has simply quit his job to avoid making payments before he moves again to renew the vicious cycle.[2] It may be equally impossible to collect from a wealthy professional, who, after a divorce, denies paternity, hides assets, moves from State to State for years to avoid paying child support, and owes his children hundreds of thousands of dollars.[3] Sadly, examples such as these are all too common.

The Ninth Circuit decision will only exacerbate the difficulties of collecting child support. Creating a right of action that allows custodial parents to file a private lawsuit against the State whenever a parent alleges that the State has not satisfactorily collected the support that the noncustodial parent owes, thus creating a 100 percent compliance standard, will harm all Title IV-D beneficiaries because the time, effort, and money

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[2] One noncustodial parent's extensive efforts to avoid his child support obligation included quitting a job to avoid a wage withholding order, hiding income, failing to obey 12 consecutive court orders to appear, moving to at least three States, and assuming false identities. He was assisted in these activities by his mother. *Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support, Hearings Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (statement of Martha Barger, Victimized Parent, Wheaton, IL).

[3] Another "deadbeat dad" who has received national press attention recently earned more than $300,000 a year, yet failed to pay about $640,000 in child support while living in a number of States and Canada. Orange County Register, June 3, 1996, at 22.

that States will be forced to divert to defend these actions will–by necessity–be taken from honest efforts to serve the millions of families that currently benefit from this growing program that is designed to force irresponsible parents to provide for their children. These children will suffer from overburdened IV-D programs that will be significantly less capable of serving them. Therefore, this Court should reverse the Ninth Circuit decision.

ARGUMENT

I. EVEN IF A STATE PERFORMS EVERY CHILD SUPPORT ENFORCEMENT ACTIVITY PERFECTLY, ALL THE CHILD SUPPORT DUE IN EVERY CASE MAY NOT BE COLLECTED BECAUSE OF THE REAL WORLD PROBLEMS THAT THE NINTH CIRCUIT IGNORES.

On the surface, getting parents to take responsibility for their own children might seem to be a relatively easy objective. In reality, however, this "easy" objective can prove virtually unattainable. Indeed, notwithstanding Title IV-D's elaborate system of plans, policies and procedures, the irrebuttable fact remains that collections are not always possible, as evidenced by the national collection rate of 18 percent.[4] Why is enforcement so difficult? The most significant reason, and the factor that makes the Ninth Circuit's decision unworkable, is that, at every juncture in this complex and massive program, States run into any number of external variables that are outside their control, yet can drive the outcome and, in some cases, make enforcement impossible.

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[4] Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Child Support Enforcement, Nineteenth Annual Report to Congress, for the Period Ending September 30, 1994*, at 28 (1994) [hereinafter *Nineteenth Annual Report to Congress*].

To understand the number of external variables on which enforcement hinges, it is important to first understand the size and scope of the IV-D program and the complex and involved nature of the child support enforcement process.[5] The Title IV-

[5] The Title IV-D child support process can follow many different paths and involve many different steps, which may approximate the following: (1) first, assuming that the custodial parent decides to turn to government assistance rather than the many other available options, a custodial parent must fill out an application for services. Within 20 days of receiving the application, a child support worker must open a case by establishing a case record. The worker will contact the custodial parent for an intake interview, at which the worker gathers basic data about the custodial parent and child and as much information about the noncustodial parent as possible; (2) if the location of the noncustodial parent is unknown, the worker begins to use the information the custodial parent has given to search the databases available to locate the other parent (such as employment records, motor vehicle records, tax records, and many other locator tools); (3) once the worker has located the noncustodial parent, the worker will initiate paternity establishment proceedings and establish a support order or enforcement proceedings, depending on the stage at which a case enters the system; (4) if the child has no legal father, within 90 days of locating the alleged father, the worker must summon him to court for paternity establishment and child support proceedings. In most States, this requires the State to make personal service of the notice of proceedings on the alleged father. At the hearing, the court may order the mother, alleged father and child to undergo genetic testing before making a paternity determination. If the alleged father fails to appear for the hearing and service was properly made, the court can enter a default judgment of paternity against him and proceed to establish a support order; (5) if paternity has already been established, within 90 days the worker must initiate proceeding to establish a support order, if none exists. This too requires the worker to make service–usually personal–on the noncustodial parent of the hearing to establish a support order. At that hearing the court will use the State child support guidelines to determine the amount of support and enter an order in that amount. If the noncustodial parent fails to appear, the court may enter a default order based on the information it has before it about both parents' financial situations; (6) upon entry of an order, the IV-D agency begins collecting the support and distributing all or part of it to the custodial family; (7) in seeking a support order, the State must also ask the court to order the noncustodial parent to provide group health coverage for the child if it is available; (8) to enforce the order, the worker must first try to implement a wage assignment, so that

D program currently is a massive undertaking that provides support enforcement services to families who receive public assistance,[6] families who do not receive public assistance but apply for services,[7] families that have children in foster care,[8] families that receive medical assistance,[9] and families that reside in other States.[10] State programs may be called upon to establish paternity for children who have no legal father, establish child support orders for children who are not living with both parents, collect the child support ordered by the courts for the custodial family, find assets of the noncustodial parent to satisfy the support obligation if regular support payments cease, distribute the child support collected to the custodial family, modify the

the employer will deduct the child support from the noncustodial parent's paycheck. The success of this activity hinges on how conscientious the employer is about reporting the identities of its employees (both long-term, and in some States, newly-hired) and about deducting the support and sending it to the IV-D agency; (9) any time the noncustodial parent changes jobs, the worker will have to repeat this process, and get the new employer to implement the wage assignment; (10) if the support owed cannot be collected through a wage assignment, the child support worker must find other sources of income using locator tools such as unemployment benefits, workers compensation payments, bank accounts, tax refunds, lottery winnings, and rental receipts; (11) modification of orders, based on reviews that must be conducted every three years, requires new support orders that take into account the current financial situation of both parents; and (12) if the noncustodial parent is out-of-state, different locator tools must be used and difficult jurisdictional issues are raised.

[6] 42 U.S.C. § 654.

[7] IV-D services are available to all applicants without limitation. This means that if a millionaire falls behind in child and spousal support, the former spouse can receive IV-D services, either free or upon payment of an application fee up to $25. 42 U.S.C. § 654(6); U.S. House of Representatives, Ways and Means Comm., *1994 Green Book, Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*, 103d Cong., 2d Sess. 459 (1994) [hereinafter the *1994 Green Book*].

[8] 42 U.S.C. § 654.

[9] Id.

[10] Id.

child support orders as the noncustodial families' situations change, and locate noncustodial parents who may not want to be found.

Consequently, any single case can require that the State CSE program perform hundreds of individual actions over the term of the case. Successfully navigating through this maze of activity is no small feat; in addition to balancing a number of concurrent activities, caseworkers must also interact with a number of case participants who have competing priorities.[11] In addition to the case principals–the child, custodial parent, and noncustodial parent–delivery of child support enforcement services may also involve the executive,[12] legislative,[13] and judicial agencies[14] of State and local government (such as tax collection agencies), the courts and district attorneys, and private institutions (such as banks, employers, and credit bureaus).[15]

The following section reveals a mere sample of the most common and frequent problems that Title IV-D programs encounter that make the Ninth Circuit's decision unworkable.

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[11] During its "lifespan, a case could involve dozens of employers, several private attorneys, court staff, financial institutions, welfare eligibility workers, even interested public officials." *Child Support Enforcement: The Federal Role, Hearings Before the Subcomm. on Federal Services, Postal Service, and Civil Service of the Senate Comm. on Government Affairs*, 103d Cong., 2d Sess. (statement of Pat Addison, Program Specialist, Commonwealth of Virginia, Dept. of Social Services, Division of Child Support Enforcement) [hereinafter Statement of Addison].

[12] When child support enforcement activities are handled through an administrative proceeding.

[13] Legislatures make program funding decisions.

[14] When child support enforcement activities are handled through a judicial proceeding.

[15] Federal law calls for States to use several enforcement tools that require interaction with other private and public entities. These include State and federal tax refund offset procedures, unemployment compensation offset procedures, liens against real and personal property for overdue support amounts, State tax refund withholding, reporting overdue support owed to consumer credit bureaus, and requiring bonds or other guarantees to secure overdue payments. *1994 Green Book*, at 469-470.

A. Serving a Growing CSE Caseload.

The CSE caseload increased 180 percent between 1980 and 1992, from 5.4 million to 15.2 million.[16] In fiscal year 1994 the IV-D caseload was composed of 18.6 million cases.[17] In a 1992 study of 136 local child support offices, the U.S. General Accounting Office ("GAO") found that overall caseloads per worker nationwide equal or even exceed 1,000 cases at any one time.[18] None of these of cases can be resolved through a single activity and no two cases are ever identical. Many CSE cases may also remain active for decades, depending on State law and federal case closure rules.[19] A single case may be in the system for many years, until the child reaches the State's age of majority.[20]

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[16] *Child Support Enforcement; Federal Efforts Have Not Kept Pace With Expanding Program, Hearings Before the Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs*, 103d Cong., 2d Sess. (1994) (statement of Joseph F. Delfico, Director, Income Security Issues, U.S. General Accounting Office)) [hereinafter Statement of Delfico].

[17] *Nineteenth Annual Report to Congress*, at 27.

[18] General Accounting Office, *Interstate Child Support: Wage Withholding Not Fulfilling Expectations* 54 (1992) [hereinafter *Interstate Child Support*]; *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong., 1st Sess. 112 (1995) (statement of Wallace Dutkowski, Director of Child Support, Michigan Dept. of Social Services, for the American Public Welfare Association) [hereinafter Statement of Dutkowski].

[19] The age of majority varies by State. Some States may also seek recovery of arrears after the child reaches adulthood. Collection efforts may also continue beyond the legal age of majority if the child is attending college. (It is widely perceived that the regulations on case closure are restrictive and prohibit closing cases that are unworkable).

[20] U.S. Commission on Interstate Child Support, *Supporting Our Children: A Blueprint for Reform; The U.S. Commission on Interstate Child Support's Report to Congress* 159-160 (1992); Statement of Addison.

Today, at least one-third of all American families are headed by single parents.[21] The social trend of single parenthood,[22] not surprisingly, has resulted in alarming growth in the demand for IV-D services. Between 1980 and 1992 non-AFDC cases grew from 15 percent to 43 percent of the caseload.[23] In fact, the non-AFDC caseload now exceeds the ongoing AFDC caseload.[24]

B. Locating Absent Parents.

Federal regulations require States to access all appropriate locate sources within 75 calendar days of determining that location is necessary to take the next appropriate action in a case. To be in substantial compliance with IV-D, the States must satisfy this standard in 75 percent of the cases pursuant to 45 C.F.R. § 303.3. (The 75 percent standard applies to all other substantive areas as well). 45 C.F.R. § 305.20(a)(3)(ii).

Location of absent parents is made difficult by factors such as: (1) a woman's genuine lack of knowledge as to the surname of the alleged father; (2) the custodial parent's inability or unwillingness to provide additional information about the alleged

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[21] Paula Roberts, *New Child Support Data From the Census Bureau*, Clearinghouse Review (Jan. 1996), at 874.

[22] From 1970 to 1992, the number of children living with a divorced parent nearly tripled, while the number living with a never married parent grew nearly elevenfold. *1994 Green Book*, at 459. In 1991, the number of births to unmarried mothers was 1.2 million. Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Eighteenth Annual Report to Congress (for the period ending Sept. 30, 1993)* 3 (1994) [hereinafter *Eighteenth Annual Report to Congress*]. In 1992, 1.2 million divorces were granted in the United States. Id.

[23] Statement of Delfico.

[24] *Child Support Enforcement; Opportunity to Reduce Federal and State Costs, Hearings Before the Subcomm. on Human Resources, House Comm. on Ways and Means*, 104th Cong., 1st Sess. 3 (1995) (statement of Jane L. Ross, Director, Income Security Issues, Health, Education and Human Services Division) [hereinafter Statement of Ross].

father[25] (such as a date of birth or Social Security number that are needed to search locator databases); (3) the significant mobility of Americans; and (4) the conscious and diligent effort on the part of some noncustodial parents to evade responsibility by using fraudulent social security numbers, moving across jurisdictional lines to avoid location, and leaving jobs to avoid garnishment of wages.[26]

C. Establishing Paternity.

The IV-D agency must attempt to establish paternity in all cases in which children have been born out of wedlock. 45 C.F.R. §§ 302.31. The average number of children in the CSE caseload requiring paternity establishment in fiscal year 1993 was 3.5 million.[27]

Establishing paternity is complicated by the following factors: (1) multiple possible fathers often exist, all of whom must be located, served with process, and genetically tested; (2) one of the parties fails to appear for genetic testing; (3) the mother was married to, but not living with, her husband, who is not the father of the child; (4) the mother fails to appear in court as a necessary witness in a default hearing; (5) mothers often do not seek to establish paternity when their babies are born, and it is generally more difficult to establish paternity by the time they apply for AFDC or Medicaid benefits;[28] and (6) the process by which paternity is established vary by State (some States may,

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[25] Often, custodial parents simply cannot obtain accurate information because they are forced to rely on information provided by the noncustodial parents, their family or their friends as to his location.

[26] *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Hearings Before the Subcomm. on Human Resources of the House Ways and Means Committee*, 104th Cong., 1st Sess. (1995) (statement of Marilyn Ray Smith, President, National Child Support Enforcement Association) [hereinafter Statement of Smith].

[27] *Eighteenth Annual Report to Congress*, at 44.

[28] Roberts, Paula, *Hot Topic/Cold Reality: Establishing Paternity for Children Receiving Public Assistance*, Clearinghouse Review, 49-53 (May 1995).

for example, require jury trials to resolve contested paternity cases).

D. Providing Services in Interstate Cases.

The handling of interstate cases is far more difficult and complex than the handling of intrastate cases. Custodial parents in interstate cases are less likely to receive support payments than those in intrastate cases.[29] Approximately 30 percent of the national caseload involves interstate cases, but, as a result of the many barriers to interstate enforcement, interstate collections comprise only 8 percent of total collections.[30]

Interstate case processing requires individuals and agencies in two or more jurisdictions to coordinate a series of activities; communicate detailed information precisely and in a form compatible with the needs of other jurisdictions; and understand and cooperate with the varying policies and procedures that jurisdictions across the country follow.[31]

Such cases may be stalled by: (1) a lack of uniformity in laws (e.g., each state has its own particular laws, rules, procedures, support guidelines, etc.); (2) inconsistent interpretation of laws and orders; (3) a tendency by judges in the noncustodial parent's State to favor the noncustodial parent who is before the court, as opposed to the custodial parent, who is not present; (4) the staleness of information in the petition by the time the hearing is set; and (5) the difficulty of obtaining information from another state to refute an noncustodial parent's defense, due to difficulty in reaching the custodial parent (who may be unable to afford a telephone).

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[29] General Accounting Office, *Interstate Child Support; Mothers Report Receiving Less Support From Out-of-State Fathers*, 3 (1992).

[30] *Nineteenth Annual Report to Congress*, at 35 (data for fiscal year 1994).

[31] *Supporting Our Children: A Blueprint for Reform*, at 3.

E. Serving Teenage Parents.

In 1993 72 percent of all nonmarital births were to mothers under age 20.[32] Cases involving teen parents usually require more services and are more difficult to successfully serve than cases involving older and married or formerly married parents. These cases typically require paternity establishment and paternity may be contested rather than acknowledged.[33] Young parents, many of whom may still be in high school, may not be employed or financially capable of paying child support.[34] Young parents are also less likely to understand the complexity of the child support enforcement program and are therefore less capable of assisting in their cases than older parents.[35]

F. Establishing Support Obligations.

Within 90 days of location, a IV-D agency must establish a support order or complete service of process in support proceedings in at least 75 percent of its cases. 45 C.F.R. §303.4. Like every other child support enforcement activity, this is a high volume task. In fiscal year 1994, for example, the IV-D program established over 1 million support orders.[36]

Circumstances that contribute to the difficulty of establishing support orders include: (1) the noncustodial parent is self-employed and lies about his income; (2) the noncustodial parent declares bankruptcy; and (3) the support guidelines are complex requiring consideration of a number of issues, such as custodial arrangements, costs of child care, any special needs of the child,

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[32] *Advance Report on Final Natality Statistics, 1993*, Monthly Vital Statistics Report, Vol. 44, No. 3, Sup. (1995).

[33] *See generally, Supporting Our Children: A Blueprint for Reform*, at 193-200 (discusses issues specific to teenage parents).

[34] Id.

[35] Id.

[36] *Nineteenth Annual Report to Congress*, at 2.

and the age of the child, and they vary from state to state, complicating interstate cases.[37]

Federal regulations also require IV-D agencies to ask that medical support be included in every child support order. 45 C.F.R. §302.80. State IV-D agencies must also enforce these medical child support orders. Medical support enforcement requires States, in addition to their other duties, to: (1) process referrals from the Medicaid agency; (2) determine whether the noncustodial parent has a health insurance policy or plan that will cover the child; (3) obtain information about the plan to enable the filing of claims; (4) file claims with the insurer (or transfer the information to the Medicaid agency for filing); (5) secure health insurance coverage through a court or administrative order; and (6) recover amounts necessary to reimburse medical assistance payments made by the State on the child's behalf.[38] Enforcement is made difficult by factors such as: (1) noncustodial parents who will not obtain available group health coverage or refuse to enroll their child; (2) noncustodial parents who refuse to provide information identifying the plan and the procedures for filing claims or refuse to allow the custodial parent to file claims, preventing the custodial parent from reimbursing the provider or getting back funds paid to the provider; (3) employers and insurers that fail to provide information concerning the availability of group coverage; (4) employers that fail to deduct an amount sufficient to cover the cost of health insurance premiums; (5) employers that fail to handle enrollment when the noncustodial parent refuses to comply with the support order;[39] and (6) the federal Employment Retirement Income Security Act of 1974 ("ERISA")[40] complicates the process by allowing covered health plans to determine whether a medical child

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[37] *See, e.g.*, Statement of Addison (the age of majority with respect to child support enforcement varies by State).

[38] *1994 Green Book*, at 473-474.

[39] See, General Accounting Office, *Ensuring That Noncustodial Parents Provide Health Insurance Can Save Costs*, 1-2 (1972).

[40] 29 U.S.C. § 1001 et seq.

support order is qualified, triggering the plan's obligation to administer the provision of benefits under the order.[41] Each health plan covered under ERISA may also have its own set of requirements[42] which make mass processing of orders impossible and individual handling of each ERISA case a necessity.

G. Enforcing Support Obligations.

In IV-D cases in which the responsibility for and obligation of support are set, the agency must enforce the order using a wide range of mandated enforcement techniques. 45 C.F.R. § 303.6. While wage withholding may be the most effective tool for enforcement of support orders,[43] efforts to withhold wages are made difficult by circumstances such as: (1) a noncustodial parent who has little or no income due to incarceration, unemployment or disability;[44] (2) difficulties in timely identification of a noncustodial parent's employer, particularly where the noncustodial parent works in an industry such as construction, in which frequent job changes are common; (3) a noncustodial parent working in the underground economy to avoid paying support (and, in many cases, income taxes); (4) the inability of state courts to assert jurisdiction over an noncustodial

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[41] While the Omnibus Budget Reconciliation Act of 1993 (which amended, Section 1902 of the Social Security Act with respect to medical support requirements under Medicaid) addressed the chilling effect of ERISA on medical child support orders, some difficulties remain.

[42] One section of ERISA, found at 29 U.S.C. § 514, preempts State laws and regulations governing health insurance and employee benefit plans including employer self-funded health insurance plans.

[43] B. Paulin, *New Initiatives in Enforcing Support*, Delaware Lawyer, Summer 1993, 47, 48 (1993).

[44] An Urban Institute study found that noncustodial fathers who pay child support have significantly higher incomes than noncustodial fathers who do not pay child support. Between 11 to 25 percent of noncustodial parents had personal incomes below the poverty level (based on the poverty threshold for individuals in 1990). Sorensen, E., The Urban Institute, *Noncustodial Fathers: Can They Afford to Pay More Child Support?* 33-35 (Feb. 1995).

parent on an Indian reservation;[45] and (5) the fact that, because federal employers do not pay into the States' unemployment insurance funds, federal employees (including military employees) generally cannot be located through this mechanism.

The noncustodial parent population also tends to have very unstable employment patterns.[46] A 1992 GAO study on the efficacy of wage withholding indicates that in one quarter of the cases reviewed the noncustodial parent was reported to have left the employer by the time that the child support order was served.[47] More than half of the parents in the cases reviewed turned out to be unemployed.[48] Even where wage withholding was implemented, about half stopped paying because employment with the employer ended.[49] Not surprisingly, noncustodial parents who are self-employed or change employers frequently are very difficult to locate and pursue.

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In summary, even if the IV-D program takes every possible action in a case, an individual plaintiff still may not receive child support payments because of the factors discussed above that stand in the way of child support enforcement and collection.

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[45] Because of the Indian Tribes' status as sovereign nations, the authority of State and local governments and the jurisdiction of State law is limited or nonexistent. Consequently, State IV-D activity is generally constrained with respect to noncustodial parents who reside within the jurisdiction of an Indian Tribe. *See* F. Cohen, *Handbook on Federal Indian Law*, 241-42 (1982).

[46] "[E]very year 59 percent of child support obligors hop from job to job." Statement of Smith, at 71.

[47] *Interstate Child Support*, at 52.

[48] *Interstate Child Support*, at 52.

[49] *Interstate Child Support*, at 53.

II. ALLOWING A PRIVATE RIGHT OF ACTION WILL IMMOBILIZE THE IV-D PROGRAM, THWARTING CURRENT EFFORTS TO IMPROVE THE PROGRAM AND ULTIMATELY HARM, NOT HELP, THE CHILDREN IT SERVES.

A. Additional Costs Will be Imposed on the States.

Allowing the Ninth Circuit decision and rationale to stand would impose crippling costs on States. The potential litigants number in the millions[50] and the number of cases may be exponential because child support enforcement encompasses so many separate activities and players. A private right of action could very well result in separate litigation on each separate activity, in every State and in every county.

Congress lodged power over the IV-D program in the Secretary and required the Secretary to negotiate with States regarding the terms of their agreements with the federal government. Congress and the Secretary have left the States with the power to decide how much money a State will spend on the IV-D program.[51] State legislatures must make funding decisions among hundreds of agencies and programs competing for the States' limited financial resources. It is virtually impossible for State legislatures to accurately budget for programs when the federal courts may order that millions of dollars be spent on staff, equipment and services that were not anticipated or planned.

Multiple lawsuits would place a tremendous burden on the program. Costly litigation diverts a State's limited resources from the mission of the IV-D program to pay the Special

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[50] The number of potential plaintiffs could exceed three million in the Ninth Circuit alone. Petitioner's Petition for Writ of Certiorari, at 17, *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995).

[51] Under the State/federal funding arrangement for CSE, States receive a 66 percent federal match rate plus incentives, based on recovered child support. State and local governments must pay the remaining share of costs. *1994 Green Book*, at 489.

Master's salary, plaintiffs' attorney's fees, and the State's own costs and attorney's fees in defense of the case. This is not overstatement, but a candid reporting of unfortunate but undeniable facts.[52] The financial and personal costs to all beneficiaries would be astronomical. Time, energy, and money would be diverted from the program's mission. More custodial parents would lose because the diversion of focused resources will invariably mean that IV-D agencies will be able to help fewer people. More children will lose because increased actions being taken in a few cases will result in other cases receiving no attention. And, most importantly, there is absolutely no guarantee that any funds will be collected. The Ninth Circuit's decision is illogical, because its "solution" hurts those whom it tries to help.

B. Litigation Will Result in Conflicts Among the Secretary, the Federal Courts, States and Localities.

In addition to satisfying the Secretary, as Congress required, under the Ninth Circuit's decision, State governments will be required to satisfy federal judges if federal courts become involved in the micromanagement of the IV-D program. The result will be that States will not know what the law actually requires of them. They may face the loss of federal AFDC money through audit penalties on the one hand and contempt sanctions on the other.

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[52] The California IV-D agency estimates its costs for the Plaintiff's attorney fees in *Barnes v. Healy*, 980 F.2d 572 (9th Cir. 1993) (the case challenged the handling of the receipt and distribution of child support monies, and, among other things, the lack of notice of support collections to obligees), to be $1.71 million and the postage for mailing notices to obligees, over $1 million. West Virginia's IV-D agency estimates that its costs in connection with *Brinkley v. Hill*, No. 5:88-1502 (S.D. West. Va. __) (post-judgment litigation), which involved just one county, reached at least $600,000 per year (for expenses related to the Federal Master, plaintiff's attorney expenses, and defense).

If, for example, a federal district court issues an injunction and appoints a Special Master to supervise enforcement of the court's orders, the Director of a State's IV-D program will be placed in the impossible position of receiving conflicting directions from the Secretary and from the Special Master. The Director could be torn between either complying with the strict orders of a Special Master (who need not worry about budget constraints or cost-effectiveness), or working with the requirements of the Secretary to whom Congress granted flexibility because of the program's complex nature. On a day to day basis, imposition of a Special Master would require the IV-D staff to take precious time from pursuing support payments to satisfy time consuming requirements of the Special Master (such as compiling compliance data).

The current judicial handling of IV-D cases at the State and local level in some regions provides little reason to expect that federal judicial involvement will cause the enforcement process to run more smoothly. Variations in judicial procedures, judges' varying degrees of knowledge about the program,[53] and court delays at the State and local level have been problematic.[54] In fact, many IV-D professionals have recommended that States use administrative processes exclusively.[55] These fragmented procedures will only become more so when every jurisdiction has its own line of case law. Interstate cases, in particular, will become virtually impossible to track and enforce, as will cases in States where child support enforcement is administered at the county level. Where States have privatized child support

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[53] *Interstate Child Support*, at 59.

[54] *Child Support Enforcement; Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, Serial 103-30, 103d Cong., 1st Sess. (1993) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. of Health and Human Services).

[55] Id.

enforcement activities,[56] the initial issue is where true liability would lie. It is likely that suits against these States will lead to a complex web of litigation that draws in the State, the contractors, private employers, and any other players whose compliance is essential to successful enforcement.

C. Child Support Policy Should be Made by the Executive Branch and the Congress, Who Speak for the Will of the People, Rather than the Judicial Branch.

The IV-D program is one of a number of State/federal programs that serve children in need.[57] Government resources are not unlimited, and, if certain welfare reform bills currently pending in Congress become law, States will find that they have significantly less money with which to provide these services. The grim reality is that sound social policy will continue to require identification, evaluation, and implementation of trade-offs. In an environment in which all parties can agree that the need is growing, State and federal programs should decide where scant resources are best spent. The decision of whether services should be expanded, maintained, or cut altogether should be made by the executive branch and by Congress who speak for the will of the people who pay for and benefit from the programs. Turning this role over to the judiciary would surely "remove from the people and their representatives the ability to shape policy."[58]

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[56] As of November 1995, one or more child support services were privatized statewide in 20 states and, at the local office level, 18 states had privatized services. At that time, additional privatization was planned in several states. General Accounting Office, *Child Support Enforcement: States and Localities Move to Privatized Services* 2 (Nov. 1995).

[57] Such programs include Medicaid, school-based health initiatives, the Maternal and Child Health program (Title V of the Social Security Act), and the Special Supplemental Food Program for Women, Infants, and Children (WIC) under section 17 of the Child Nutrition Act of 1966.

[58] S. Fluckiger, *The Changing Relationship of the Judiciary to the Policy and Administrative Processes of Government: An Overview of Recent*

The States are best able to craft public policies that balance the interests of individual applicants against the States' taxpayers' interest in utilizing their resources efficiently. The States are best suited to obtaining the most benefits for a maximum number of people, by determining the scope of services and benefits, establishing eligibility criteria, replenishing the supply of money available for public aid, and establishing legal family relationships for their constituents. Federal judges' decisions are not made in a political process where cost, benefit, and competing claims for money are considered. A Special Master can only substitute his or her judgment concerning the allocation of resources and remedies for that of the State and federal agencies.

The Respondents not only ask the federal judiciary to make social welfare policy for States, they also ask the judiciary to exceed current congressional thinking. Not even the child support enforcement advances that Congress is currently considering can ensure that the States will be able to provide every child support enforcement service possible at all times throughout the life of every case so that every noncustodial parent supports his child.

Commentary on the Nature, Causes, Consequences, and Proposals for Reform of Contemporary Judicial Encroachment, Brigham Young L. Rev. 1985, 671, 742 (1985).

III. CONGRESS DID NOT INTEND A PRIVATE RIGHT OF ACTION WHEN IT ESTABLISHED A CAREFULLY REGULATED PUBLIC PROGRAM WHILE ALSO ALLOWING CUSTODIAL PARENTS TO PURSUE ENFORCEMENT DIRECTLY, RATHER THAN ONLY THROUGH THE STATES.

Congress chose to address the need for child support enforcement by creating a public program that is regulated by a comprehensive remedial scheme, comprised of audit provisions and detailed performance criteria, and carefully monitored by both federal and State government.[59] Congress has amended this scheme several times, making it increasingly detailed with each amendment.[60] In fact, the 1984 amendments to Title IV-D

[59] Although States are primarily responsible for administering Title IV-D, the program remains a state-federal partnership. The federal government sets the federal program standards and policy, evaluates States' performance, offers States technical assistance and training, and in certain instances offers direct assistance to States in locating absent parents and collecting support. State child support enforcement agencies have responsibility for administering the program at State and local levels. The federal government and the States, and in some States, county governments, share the program costs. *1994 Green Book*, at 455. Federal responsibility for program oversight lies with the Office of Child Support Enforcement (OCSE) in the U.S. Department of Health and Human Services.

[60] In 1984, Congress substantially expanded and changed the program through the Child Support Enforcement Amendments of 1984 (Public Law 98-378). The 1984 Amendments emphasized that States are required, among other things, to make IV-D services available to all children without regard to income. The Amendments also mandated, as a condition of receiving federal money, States' enactment of specific new statutes aimed at improving child support enforcement. In 1988, Congress enacted the Family Support Act of 1988 to further improve the program by, among other things, placing greater emphasis on establishing paternity and ensuring the fairness and currency of child support awards. (Public Law 100-485). Pursuant to the Family Support Act, IV-D agencies must review support orders and modify them, if appropriate, every three years. The 1988 Amendments also required States to implement statewide automated tracking and monitoring systems. Recognizing the problems associated with collection of support when the parties reside in different states, the

adopted an internal federal regulatory scheme significantly different from the original audit and penalty provisions which were functionally identical to those which still apply to virtually all welfare entitlement programs. *See* 42 U.S.C. § 603(h) (amended, 1984).

A. Congress Made the Secretary Responsible for Oversight of the IV-D Program.

In recognition that it could not expect States to succeed in collecting support in every single case, Congress, in 1984, statutorily delegated directed authority to the Secretary of the Department of Health and Human Services ("HHS") to define the level of performance required to substantially comply with the federal mandate to operate an effective and efficient IV-D program. 42 U.S.C. § 652. Under the standard developed by the Secretary and administered by the Office of Child Support Enforcement, States must meet the compliance provisions in 75 percent of all their cases. The Ninth Circuit decision can be read to give States no leeway at all; they would all have to meet every requirement in every case or be subject to suit in federal court.

The regulations that HHS enacted added new performance indicators to the IV-D internal enforcement scheme. These new indicators were designed (1) to compel states to achieve both AFDC cost recovery and welfare cost avoidance[61] by nonAFDC collections and (2) to set the minimum cost effectiveness

legislation also established the Commission on Interstate Child Support to recommend improvements in laws and procedures related to enforcing support orders across state lines. Many of the Commission's recommendations reflected state-based initiatives. *See, Supporting Our Children: A Blueprint for Reform*, e.g., at 127 (discusses some States' creation of rebuttable presumption of parentage in certain cases and recommends national adoption).

[61] Section 457 of the Social Security Act (42 U.S.C. 657) provides for cost recovery through the use of support collections made with respect to AFDC recipients to reimburse both the State and federal share of the current assistance payment. Cost avoidance is achieved by eliminating families' need for AFDC assistance through the collection of child support.

standards for state IV-D operations. 45 C.F.R. §§ 305.20 and 305.98. At the same time, the Secretary of HHS developed new program compliance and results audit criteria to define "substantial compliance" as required by the statutory amendments. 42 U.S.C. § 603(h).

For a State to receive federal funding for the IV-D program, the Secretary must approve the State Plan. 45 C.F.R. § 301.10. The State Plan is essentially a contract between the State and federal government upon which the availability of federal funding is predicated. The State Plan must comply with the federal regulations, many of which require States to adopt specific laws designed to improve support collection. The regulations governing the approval of State Plans contemplates a careful review of the Plan by federal regional staff, discussion with the IV-D agency for clarification, and negotiation with the IV-D agency. 45 C.F.R. § 301.13(b). The State Plan must also reflect compliance with minimum organizational and staffing requirements. 45 C.F.R. § 303.20.

If the Secretary is not assured that the State Plan complies with all regulatory requirements, the State may not receive federal funding. In carrying out its enforcement role, the Secretary uses a financial "carrot and stick" approach of incentives and penalties. Incentive payments are made based on the State's child support collections. 42 U.S.C. § 658, 45 C.F.R. §§ 302.55, 304.12. The Secretary may withhold advance funds for a State's failure to submit full and complete reports as federal regulations require. 45 C.F.R. § 301.16. The Secretary audits State programs at least every three years to determine the State's compliance with federal statutes and regulations. 42 U.S.C. § 652 (a)(4), 45 C.F.R. § 305.10.

Federal law prescribes a financial penalty for non-compliance based on a percentage of the State's AFDC federal matching funds. The first failure to substantially comply results in a penalty of one to two percent; the second results in a penalty of two to three percent; and third and subsequent failures result

in a penalty of three to five percent. 45 C.F.R. § 305.100. Comprehensive annual audits are conducted on State programs that are under penalty until the deficiencies are corrected.

Recognizing the inherent complexities of the program, Congress provided that the penalty for a failure to substantially comply may be held in abeyance for up to one year to allow the State to implement a corrective action plan. 45 C.F.R. § 305.99. At the end of the corrective action period, the Secretary conducts a follow-up audit targeted at the areas of program noncompliance. 45 C.F.R. § 305.99(d).

Congress clearly recognized that the social and practical impediments to child support enforcement required that the Secretary be given the flexibility to suspend penalty imposition so that noncomplying States could focus on developing and implementing corrective action plans. Given this recognition, Congress could not have intended to allow individuals to divert the States' attention and limited resources by filing private causes of action under IV-D whenever they chose to do so.

Moreover, the enforcement scheme is not a "dead letter," because the Secretary has taken enforcement actions. For example, in 1992, the Secretary levied one percent penalties against two States.[62] In 1993, the Secretary sent notices to fifteen States informing them that audits of their programs indicated they were not in substantial compliance with federal requirements and imposed a three percent penalty against one State.[63] In 1994, the Secretary issued final reports to seven States indicating that audits showed that they were not in substantial compliance, and imposed a one percent penalty against two States.[64]

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[62] Office of Child Support Enforcement, Administration for Children and Families, U.S. Dept. Health and Human Services, *Seventeenth Annual Report to Congress* (for the period ending Sept. 30, 1992) 45 (1993).

[63] *Eighteenth Annual Report to Congress*, at 38-39.

[64] Id.

These enforcement activities have also proven to be effective mechanisms for helping States achieve substantial compliance. For example, follow-up audit reports were issued in 1993 to seven States that had been issued notices in prior years, of these, five States had achieved substantial compliance and their penalties were rescinded (the other two were yet to be evaluated).[65] Audit penalties were also rescinded for ten of the fifteen States that were sent notices in 1993 because they had achieved substantial compliance (the remaining four were to be evaluated).[66]

B. Congress Left Intact the Custodial Parent's Rights to Take Direct Action Against the Nonpaying Parent.

The IV-D program is intended to assist custodial parents in collecting support, but it is not the parents' sole remedy. The program was not intended to replace private remedies that are available to persons seeking child support from noncustodial parents. Congress left intact the rights of parties to take court action on their own and still receive IV-D services.[67] Every custodial parent retains the right to hire an attorney or represent themselves in a court action to establish or enforce support.[68] Recognizing the importance of alternatives, many states, including Arizona, have taken steps to improve unrepresented parties' access to court, by standardizing procedures and making them more accessible to the pro se litigant. This may be done through the development of form pleadings, providing

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[65] Id. at 40.

[66] *Nineteenth Annual Report to Congress*, at 15.

[67] "We encourage States to establish a simple pro se process for establishment and modification of orders whereby the parents may essentially represent themselves." 55 FR No. 158, 33414, 33418 (1990).

[68] OCSE has made clear its position that IV-D attorneys do not represent recipients of IV-D services. In the notice of proposed rulemaking issued August 15, 1990, the Federal Office of Child Support Enforcement states that "the IV-D agency does not provide legal services per se. Support rights are assigned to the State in AFDC cases, and even in non-AFDC cases, the traditional attorney-client relationship does not exist." 55 FR 33414 (1990).

instructions and other educational materials and providing the assistance of court personnel.[69] Private agencies also provide collection services with no up front costs to the custodial parents.

It is beyond the IV-D program's scope and capacity to ensure child support collection in all cases at all times. While the IV-D program provides special access to many proven support enforcement techniques, some cases require that more stringent and repetitive enforcement efforts be taken. IV-D agencies are not able to take such actions in all of these cases, given the over 18 million IV-D cases that exist. There is no substitute for self-help. A determined custodial parent with one case may be able to accomplish more than a IV-D worker with thousands of cases.

C. Congress Did Not Intend to Create a Child Support Assurance Program Guaranteeing Custodial Parents 100 Percent Payment.

Title IV-D performs a prosecutorial function that is not intended to guarantee delivery of any specific and finite "benefit" to any specific individual or family. This is not a public benefit program; any economic benefits to individuals or families that IV-D program efforts come from noncustodial parents rather than public funds, and there is no guaranteed monthly benefit that the State pays. Congress' primary purpose in enacting Title IV-D was to reduce the amount paid from the public treasury for welfare.[70] *Wehunt v. Ledbetter*, 875 F.2d 1559 (11th Cir. 1989).

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[69] *See generally*, U.S. Dept. of Health and Human Services, *Developing Effective Procedures for Pro Se Modification of Child Support Awards* (1991).

[70] The IV-D program was originally intended to ease taxpayer burdens by recouping state and federal welfare expenditures necessitated by noncustodial parents' failure to make child support payments. *See* Social Services Amendments of 1974, S. Rep. No. 93-1356, 93d Cong. 2d Sess. 42 (1974).

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The State human service agencies do not oppose the Ninth Circuit decision because they want to quash national child support enforcement efforts. They share the Respondents' desire for successful child support enforcement and devoutly wish that absent parents would take responsibility for their children so that they can grow up healthy, secure in the knowledge that their financial needs will be met and that they are valued by both their parents. Rather, State IV-D human service agencies oppose the Ninth Circuit decision because their extensive experience in constantly striving to improve the IV-D program and effectively increase the chances of recovering support, has taught them what will and will not improve the system. The Ninth Circuit's "answer' to the myriad of problems plaguing the system is really no answer at all.

Congress has already created a comprehensive system of oversight for the child support enforcement program and individuals who are dissatisfied with the services they receive have other avenues of redress. Private rights of action will force federal courts to appropriate for themselves the legislative prerogative to make sensitive funding decisions, involving them in a morass of individual case minutiae as well as broad policy decisions. Even if the courts were inclined to inject themselves into this process, better child support enforcement is not guaranteed because too many variables outside the program control the results. Lawsuits against the States will not make fathers acknowledge paternity without the compulsion of genetic testing or stop running from jurisdiction to jurisdiction and job to job to evade responsibility, or send a check every month to satisfy a child support order. In fact, these suits can only divert attention away from the real problem of parental irresponsibility, drain precious State resources, and because of the flood of litigation that would follow, worsen the child support services most families receive.

Since the inception of the IV-D program in 1975, States' abilities to locate fathers, obtain and enforce child support orders and collect support have grown tremendously.[71] While there are still gains to be achieved in the program, States and Congress are working diligently to achieve them, as evidenced by current proposals in Congress, a recent Executive Order, and State innovations[72] that would alleviate some of the major difficulties States face in enforcing child support.[73] We ask that the Court assist States by allowing them to continue improving the program by concentrating their resources on areas that will realistically improve the IV-D program for all families.

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[71] The number of paternities established though IV-D agencies has more than doubled between 1987 and 1993. Total IV-D collections increased from $3.9 billion in 1987 to an estimated $9.8 billion in 1994. *Child Support Enforcement Provisions Included in Personal Responsibility Act as Part of the CWA Before the Subcomm. on Human Resources of the House Ways and Means Comm.*, 104th Cong. 1st Sess. 112 (1995) (statement of David T. Ellwood, Asst. Secretary for Planning and Evaluation, U.S. Dept. Health and Human Services).

[72] States are developing innovations in child support enforcement through demonstration projects. For example, Florida discussed with HHS the possibility of developing a new system to identify Social Security numbers. Similarly, New England States are developing an interstate compact to facilitate collection in interstate cases. *Support Enforcement; Opportunity to Reduce Federal and State Costs," Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means,* 104th Cong. 1st Sess. (1995) (statement of Mary Jo Bane, Asst. Secretary for Children and Families, U.S. Dept. Health and Human Services).

[73] The President's Executive Order on Child Support (issued Feb. 27, 1995), would implement a new program that will help track nonpaying parents across State lines; challenge all States to follow the lead of the twenty-five States that already require or encourage employers to report new hires, and direct HHS to issue new regulations requiring women who apply for welfare to comply with parental establishment requirements before receiving benefits. In Congress, the Welfare Reform bill (introduced as H.R. 3507 in the House and S. 1795 in the Senate) would, among other things, require the establishment of a State and federal case registry, State and national new hire directories, an expanded federal parent locator service, and administrative enforcement in interstate cases.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision.

Respectfully submitted,

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(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, SUSAN HARRINGTON, SONYA MADRID, JUDITH ROGERS and ESPERANZA LAUSTAUNAU, individually, on behalf of their minor children and on behalf of all persons similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE STATES OF ILLINOIS, ALABAMA, ALASKA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WYOMING, AND THE DISTRICT OF COLUMBIA, AMERICAN SAMOA, GUAM, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The *amici curiae* States of Illinois, Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming, the District of Columbia, American Samoa, Guam, and the Virgin Islands, submit this brief pursuant to Supreme Court Rule 37 in support of the Petitioner, Linda J. Blessing, Director, Arizona Department of Economic Security, requesting reversal of the decision rendered by the United States Court of Appeals for the Ninth Circuit in *Freestone v. Cowan*, 68 F.3d 1141 (9th Cir. 1995).

The *Freestone* decision, and the other cases which are in accord,[1] substantially broaden the scope of State liability under 42 U.S.C. §1983 by allowing courts to find that federal regulations create enforceable rights to sue State actors in federal court. The Ninth Circuit decision, if affirmed, will dramatically alter the States' responsibilities for child support enforcement. There will also be an increased burden on the federal courts, since any individual who claims not to have received some child support

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[1] *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir. 1993); *Davis v. McClaran*, 909 S.W.2d 412 (Tenn. 1995); *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993); *King v. Bradley*, 829 F. Supp. 989 (N.D. Ill. 1993); *Monzon v. Martinez*, 833 F. Supp. 479 (E.D. Pa. 1993); *Behunin v. Jefferson County Department of School Services*, 744 F. Supp. 255 (D. Colo. 1990).

enforcement service will have the ability to bring an action in federal court. The State IV-D agencies, and the State courts, would be subject to varying orders from State and federal courts to "hurry up" or to engage in a court-created process in each of these individual cases. There would be a concomitant increase in each State's cost of providing child support enforcement services. Ultimately, this would divert fiscal resources from the actual collection of child support and impose enormous financial and programmatic burdens on State IV-D programs. This ruling would open the door for multitudinous suits to determine individual rights created by federal regulation.

Everyone agrees child support enforcement programs are a necessity in today's society. Collecting child support to remove families from welfare and prevent other families from entering the welfare system is sound public policy. Since the original legislation in 1975, this country has moved steadily toward establishing effectively run child support enforcement programs at both the State and federal levels. New and innovative methods of collecting child support from errant responsible relatives are being tested on an ongoing basis. Some methods have proven to work better than others. The most effective methods of collecting child support are being put into place.

It must be acknowledged, however, that child support enforcement programs are not yet perfect. In fact, it is questionable whether they will ever become perfect. Reality dictates otherwise. Congress has never expected or required the States to run perfect IV-D programs. For this Court to allow litigants to sue to require more from the States is contrary to Congress' intent and sound public policy.

SUMMARY OF ARGUMENT

At issue before this Court is the ruling of the United States Court of Appeals for the Ninth Circuit holding that Title IV-D of the Social Security Act creates enforceable rights in the plaintiff class and that the statute does not contain an enforcement scheme sufficiently comprehensive to preclude a §1983 action. The enforceable rights analysis of the Ninth Circuit reflects a disregard of the governing principles expressed by this Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) ("Pennhurst I"), and *Suter v. Artist M.*, 503 U.S. 347 (1992). Congress did not intend to create a new federal entitlement to child support enforcement services by enacting Title IV-D in 1975, or by any of the subsequent additions and amendments. Or, if Title IV-D was intended to create new federal property rights, Congress certainly did not intend for the federal courts to oversee the provision of State court family law services by State officials through private §1983 enforcement actions.

Title IV-D contains a complex and comprehensive internal regulatory enforcement mechanism. Congress created an entirely new and separate administrative agency in the Office of Child Support Enforcement (hereinafter "OCSE"), within the Department of Health and Human Services (hereinafter "HHS"), to implement, assess, and enforce Title IV-D. Considerable technical expertise is necessary to understand what is required for each State to develop an efficient and effective child support enforcement program which works efficiently and effectively with the other States and Territories. Congress committed this task to the OCSE and not to the federal judiciary, except by the normal process of judicial review of administrative agency action.

ARGUMENT

I.

CONGRESS NEVER INTENDED TITLE IV-D OF THE SOCIAL SECURITY ACT TO CREATE ENFORCEABLE RIGHTS TO CHILD SUPPORT ENFORCEMENT SERVICES.

A. Standard Of Review And Legislative Intent.

This Court has held that there are two distinct questions of law which control whether a federal cause of action results from the interaction of a federal statute and 42 U.S.C. §1983. A court must first decide whether Congress intended the statute to create rights sufficiently definite and certain for enforcement by the §1983 remedy. *Suter v. Artist M.*, 503 U.S. 347, 357 (1992); *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 508 (1990); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987); *Pennhurst State School & Hospital v. Halderman* (*Pennhurst I*), 451 U.S. 1, 18-28 (1981). If the statute was intended to benefit the putative plaintiff, "the provision creates an enforceable right unless it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit, . . . or unless the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " *Wilder*, 496 U.S. at 509 (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989), *quoting Wright v. Roanoke*, 479 U.S. at 431-32). Finally, if a statute does create enforceable rights within the meaning of §1983, a court must then decide whether Congress has foreclosed enforcement of the statute in the enactment itself. *Id.* at 508.

The first inquiry is to determine the intent of federal legislation. Congressional intent may be discerned from legislative history, the language of the statutes themselves, and the structure of the statutory scheme as a whole. *Suter*, 503 U.S. at 357. Courts have focused primarily on whether the statutory language is literally mandatory, and its degree of specificity. *Pennhurst I*, 451 U.S. at 19; *see, e.g., Edwards v. District of Columbia*, 821 F.2d 651, 654-656 (D.C. Cir. 1987).

This Court has previously identified four factors which are present when a federal statute does not create enforceable rights:

> (1) the plaintiffs are not part of the class for whose especial benefit the statute was passed; (2) the indicia of legislative intent reveals no congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purposes of the legislative scheme; and (4) the respondents' cause of action is a subject traditionally relegated to state law.[2]

Cort v. Ash, 422 U.S. 66, 78-79 (1975); *see also Merrell Dow Pharmaceutical, Inc. v. Thompson*, 478 U.S. 804, 810-12 (1986). Although these four factors were used to determine whether a statute creates an implied right of action in favor of a particular plaintiff, there is a significant area of overlap remaining between that determina-

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[2] This case involves child support enforcement and establishment of paternity. Congress acknowledges that the basic responsibility for child support and establishment of paternity is left to the States. S. Rep. No. 98-387, 98th Cong., 2d Sess. 6-7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2402-2403. Moreover, there has been a long-standing tradition of reserving domestic relations matters to the States. *Thompson v. Thompson*, 484 U.S. 174, 186 n.4 (1988).

tion and the determination of whether a federal statute confers substantive rights on a § 1983 plaintiff. *See Wilder*, 496 U.S. at 525-26 (Rehnquist, C.J., dissenting).

B. The History Of Federal Child Support Enforcement Legislation Demonstrates That Title IV-D Does Not Create Enforceable Rights.

1. Title IV-D was enacted to reduce the costs of welfare to society and not for the especial benefit of custodial parents and their children.

Title IV-D, "Child Support and Establishment of Paternity," was added to the Social Security Act in 1975. 42 U.S.C. §§651-669 (1975). Title IV-D has always been inextricably intertwined with Title IV-A, Aid to Families with Dependent Children ("AFDC"). 42 U.S.C. §§601-617 (1935) (amended 1975); *Sullivan v. Stroop*, 496 U.S. 478, 483 (1990). Both Title IV-A and Title IV-D operate through federal grants-in-aid contracts with participating States; States receive federal matching funds for State expenditures for programs which must meet federal legislative and contractual requirements.

The legislative history, the structural connections between Title IV-D and Title IV-A statutes, and certain features of the statutes themselves, show that Congress intended IV-D to produce general benefits to society as a whole, the most immediate and direct being welfare cost avoidance by reducing poverty in the rapidly growing class of children of absent parents and their custodians. *See Wehunt v. Ledbetter*, 875 F.2d 1558, 1565 (11th Cir. 1989). The purpose of federal child support legislation has always been to mitigate the social costs which flow from the sharp and continuing proportional increase

of impoverished single parents and children.[3] Congress hoped to realize several national welfare benefits by improving the socio-economic status of a distinct group burdened with a particular set of disadvantages. Congress never intended the legislation making federal funds available for State child support enforcement programs to confer a new federal "entitlement" on millions of individuals who must or may receive IV-D services.

AFDC, which was constitutionally grounded on the federal spending powers, originated during the 1930's.[4] Title IV-A has always been a joint federal and State welfare program, administered by the States in accordance with federal requirements, delivering financial assistance to poor families with children who are economically deprived of support from two parents due to absence, incapacity, or death of one parent.[5]

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[3] This trend is not limited to the United States; it is global, and generally attributed by scholars and researchers to the effect of modern industrial technology and economic systems on family and social structures. *See* Garfinkel & McLanahan, *Single Mothers and Their Children: A New American Dilemma*, Urban Institute Press, Washington, D.C. (1986), pp. 12, 46, 55-85, 173.

[4] Article I, § 8, cl. 1, of the U.S. Constitution contains the spending power, which provides, "Congress shall have Power To . . . provide for the . . . general Welfare of the United States." Title IV-D was also enacted by Congress pursuant to its spending power. Social Services Amendments of 1974, Pub. L. No. 93-647, §451 *et seq.*, 1974 U.S.C.C.A.N. (88 Stat.) 2716, 2732. *See also Wehunt v. Ledbetter*, 875 F.2d at 1563.

[5] In 1961, States were given the option of extending AFDC benefits to two parent families where the principle wage-earner is underemployed, or unemployed and ineligible for unemployment insurance (AFDC-UP). The Family Support Act

(continued...)

The original federal child support enforcement provisions were exclusively directed at collecting support to decrease the costs of AFDC and other welfare programs.[6] Any support collected was paid to the family, and was counted as income to the recipients for purposes of AFDC eligibility. In 1975, Congress decided to: separate the State child support enforcement activities organizationally from IV-A financial assistance activities; overrule judicial decisions which had prevented garnishment of federal payments to child support obligators; impose federal requirements designed to achieve both improved State family law enforcement mechanisms and national consistency in certain aspects of family law; include non-AFDC recipients; provide increased incentives to States to actively pursue child support enforcement; and increase federal assistance to and oversight of State programs. Social Services Amendments of 1974, Pub. L. 93-647, §451 *et seq.*, 1974 U.S.C.C.A.N. (88 Stat.) 2716, 2732 (codified at 42 U.S.C. §602 (a)).

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[5] (...continued)
of 1988 made AFDC-UP mandatory for all IV-A programs for a trial period to end in 1998. Family Support Act of 1988, Pub. L. No. 100-485, §401, 1988 U.S.C.C.A.N. (102 Stat.) 2343, 2396.

[6] AFDC recipients are automatically eligible for food stamps, and housing benefits, due to the relative eligibility standards. 7 U.S.C. §2014 *et seq.* (1996). Food stamps began in 1964. Pub. L. No. 88-525, §2, 78 Stat. 703 (1964). Benefits between all three programs are coordinated, as the monetary value of a family's monthly food stamps allotment and housing subsidies may be counted as income for purposes of AFDC benefits. Cost avoidance in non-AFDC welfare programs has always been a goal of federal child support legislation.

Title IV-A required participation in a separate child support enforcement program under Title IV-D as a condition of IV-A participation. *Id.*, 1974 U.S.C.C.A.N. (88 Stat.) 2716, 2742. The sanction for failing to operate a State IV-D program in compliance with federal requirements was, and still is, reduction in federal IV-A payments. There has never, however, been a noncompliance sanction on federal IV-D payments. 42 U.S.C. §603 (h) (1996).

The federal child support enforcement program established in Title IV-D remains adjunct to IV-A; States must participate in both to participate in either. Applicants and recipients are required to: 1) assign to the granting State all rights to support from any third party which have accrued at the time of assignment; and 2) cooperate in establishing paternity and support obligations and in enforcing assigned obligations, unless the State IV-A agency finds good cause for failure to cooperate, based on federal standards considering the child's best interests. 42 U.S.C. §602 (a) (26) (1996).

Congress created a separate organizational unit within HHS to administer Title IV-D, the OCSE. 42 U.S.C. §652 (1975). Congress delegated to OSCE the discretionary authority to define an "efficient and effective" State child support program, to decide whether States were complying with federal IV-D requirements based on annual program audits. *Id.* The original IV-D services included locating absent parents, establishing paternity and support obligations, and enforcing support obligations assigned to the State under U.S.C. §602 (a) (26). 42 U.S.C. §654 (1975).

Congress also decided that non-AFDC families should receive IV-D enforcement services which again shows the

legislative focus on cost avoidance, rather than creation of a new entitlement. 42 U.S.C. §654 (6) (1975) (amended 1981). Extending IV-D services to non-AFDC families produced significant cost avoidance.

> [T]he problem of non-support is broader than the AFDC rolls and . . . many families might be able to avoid the necessity of applying for welfare in the first place if they had adequate assistance in obtaining the support due from absent parents.

S. Rep. No. 93-1356, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 8133, 8158. The staff materials prepared for the Senate Committee on Finance regarding the Title IV-A and IV-D legislation of 1975 can leave little doubt that economic and spending issues were of paramount importance to the legislators. Staff of Senate Comm. on Finance, 94th Cong., 1st Sess., Child Support Data and Materials, pp. 1-5, and Appendixes, pp. 123-139 (Comm. Print 1975).

In 1984, Congress took steps to insure that State IV-D programs would obtain the welfare cost avoidance benefits from both non-AFDC support collections and recovery of AFDC costs. While many of the savings in social and governmental costs realized by redistributing income from absent parents to the custodial family are intangible or so indirect that measurement is difficult or impossible, research demonstrates some significant success in achieving welfare cost avoidance from non-AFDC support collections. A study commissioned by OCSE found that during 1983 and 1984, every $5.00 in non-AFDC child support collected represented $1.00 in welfare cost savings because collections either prevented non-AFDC families from participating in AFDC, Medicaid, and/or

food stamps, or reduced the amount of assistance payments.[7]

In 1980, the 75% federal financial participation for non-AFDC IV-D services was made permanent, but this incentive had not prompted all States to pursue non-AFDC cases. Therefore in 1984, Congress changed the purpose statement for IV-D to specifically state the program was intended to establish and enforce parental duties of support to all children who need assistance, regardless of whether they receive AFDC. 42 U.S.C. §651 (1975) (amended 1984). Congress wanted AFDC reimbursement as well as achieving other kinds of welfare cost avoidance flowing from non-AFDC collections.

Despite the legislative directive to provide IV-D services to non-AFDC families, certain distinctions remain between these AFDC and non-AFDC participants. For example, while the I.R.S. intercept of federal income tax returns is available in AFDC cases for past due support after the child is 18, the child must still be under 18 for I.R.S. intercepts in non-AFDC cases. 42 U.S.C. §664 (c) (2) (1996); 45 C.F.R §303.72 (a) (1994).

Another result of the 1984 amendments was the adoption of an internal regulatory scheme significantly different from the original audit and penalty provisions, which were functionally identical to those which still apply to virtually all welfare entitlement programs. 42 U.S.C. §603 (h) (1984). The new focus was on effective-

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[7] *Estimates of Cost Avoidance Attributable to Child Support Enforcement*, Advance Sciences, Inc. and SRA Technologies, Arlington, Va. 1987, for the Office of Child Support Enforcement, Family Support Administration, U.S. Dept. of Health and Human Services.

ness and efficiency, rather than technical compliance with mandatory process and procedures defined by the State plan requirements.

In both the 1984 and 1988 amendments to IV-D, Congress decided to compel the States to enact wage withholding statutes, thereby requiring the assistance of private employers for child support enforcement in order to achieve general social benefits. 42 U.S.C. §666 (b) (1984) (amended 1988). There is no clearer indication that the legislative purpose of IV-D was to secure overall benefits to large groups of citizens than the mandate in IV-D to enlist private resources to improve the economic status of children with absent parents. Federal entitlements involve providing money, money equivalents (food stamps), or subsistence needs (housing, medical care, and medicines) to a beneficiary class, from public funds. Title IV-D is not intended to deliver any particular benefits to any particular individuals or family; further, any economic benefits to individuals or families which do result are paid by private, not public funds.

2. Legislative intent reveals no congressional purpose to provide enforcement rights to Title IV-D services.

The foregoing discussion demonstrates that the legislative purpose behind Title IV-D is cost avoidance. In addition, the statutory scheme of Title IV-D establishes that Congress never intended to create enforceable rights to child support enforcement services. Instead, Congress intended to monitor and evaluate State programs, give technical assistance to the States, and, in certain instances, require the States to run more effective child support enforcement programs.

Congress by statute delegated authority to the Secretary of HHS to define what level of performance was required to substantially comply with the federal mandate to operate an effective and efficient IV-D program.[8] 42 U.S.C. §652 (1984). In response, OCSE by regulation added new program performance indicators to the IV-D internal enforcement scheme. The new indicators were designed to compel States to achieve both AFDC cost recovery and welfare cost avoidance by non-AFDC collections, and to set minimum cost-effectiveness standards for State IV-D operations. 45 C.F.R. §§305.20 and 305.98 (1985). At the same time, the Secretary of HHS, through OSCE, developed new program compliance and audit criteria to define "substantial" compliance, as required by the statutory amendment. 42 U.S.C. §603 (h) (1) (1984). The 1985 OSCE regulations provided that for the fiscal year 1984 audit period certain listed audit criteria related primarily to administrative or fiscal matters "must be met" and that the procedures required by nine audit criteria related to basic services provided under a Title IV-D plan "must be used in 75 percent of the cases

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[8] Prior to 1984, under §403 (h) of the Act a State was subject to a 5% reduction of its AFDC funds if an audit found that the State was not in full compliance with statutory and regulatory requirements. OCSE began performing compliance audits after December 21, 1976, but Congress enacted a moratorium on the 5% penalty and extended the moratorium several times. Therefore, no State actually had its AFDC funding reduced. On August 16, 1984, Congress changed the standard of compliance from full compliance to substantial compliance and provided for gradual reductions starting with a reduction of not less than 1%, nor more than 2% and increasing to a maximum of 5% with each consecutive finding that a State is not complying substantially with Title IV-D requirements. 42 U.S.C. §603 (h) (1) (1984).

come withholding actions and for renewed attempts to enforce support after initial efforts are unsuccessful. Under the new regulations "as long as some amount [of child support] is collected as a result of enforcement actions within the audit period, credit [for taking appropriate action] will be allowed regardless of whether time frames are met." *Id.*, 59 Fed. Reg. 66204, 66244-66245 (1994).

There are now four exceptions to the time frame requirements set by federal regulations. 45 C.F.R. §§305.20 (a) (4) (i)-(iv) (1994). These four broad exceptions to strict substantial compliance establish that federal funds are not unambiguously conditioned upon strict substantial compliance with time frames. The substantial compliance determination under the new Part 305 regulations are now so intertwined with exceptions that OSCE alone has the ability to determine whether a State is in substantial compliance. There are numerous reasons why a court will not be able to adequately enforce the new regulations.

First, Congress expressly delegated to the Secretary of HHS the ability to define "substantial compliance" regarding Title IV-D. 42 U.S.C. §652 (1996). *See also State of Ohio, DHS v. Sullivan*, 789 F. Supp. 1395, 1403 (S.D. Ohio 1992). Under the regulations promulgated in 1994, there is no longer a precise level of compliance that a State program must reach in order to receive federal funds. The time frame exceptions swallow many of the requirements. For example, if an enforcement technique is successful during the "audit period," a State will be considered to have taken appropriate action in the case regardless of whether time frames were met. 45 C.F.R. §305.20 (a) (4) (iv) (1994).

Second, there is no statutory guidance as to how a court should interpret the term "audit period." The term "audit period" is critical to each of the four ways States can receive credit for taking appropriate action notwithstanding time frames. However, nowhere in the statute or the regulations is the term "audit period" defined. For a court to enforce rights under Title IV-D, it would have to arbitrarily decide when an "audit period" would begin, how long the audit period would last, and when the audit period would end. "Audit period" is not defined anywhere in Title IV-D, just as "reasonable efforts" was not defined anywhere in Title IV-E. *See Suter v. Artist M.*, 503 U.S. 347, 359-60 (1992). *See also King v. Bradley*, 829 F. Supp. 989, 993-94 (N.D. Ill. 1993). Similarly, since the audit period used to determine substantial compliance is undefined, the new regulations are too amorphous for judicial enforcement. *See Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32 (1987).

Third, the Secretary of HHS makes her determination of substantial compliance based on examination of criteria that materially affect the ability of child support programs to achieve desired results. Child Support Enforcement Revisions of 1994, 59 Fed. Reg. 66204, 66212 (1994). After December 23, 1994, a determination of substantial compliance generally does not include an examination of criteria which more than 90% of States have satisfied. *Id.* This is because when more than 90% of the States are satisfying any given criterion, that criterion can be omitted from the determination of substantial compliance without materially affecting an audit's conclusion. *Id.* This materiality test further complicates the ability of the judiciary to determine whether a State

is meeting its contractual obligation to be in substantial compliance with Title IV-D.

If Congress indeed delegated authority to the Secretary to determine the dimension of IV-D rights by defining substantial compliance, then the concerns of the dissent in *Wright v. Roanoke*, would apply squarely to this case:

> I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

Wright v. Roanoke, 479 U.S. at 438 (O'Connor, J., dissenting) (emphasis original).

Congress did not intend to require the States to run perfect programs for all individuals who apply for IV-D services. Therefore, if Title IV-D creates an enforceable right, it is a unique and novel right, which can by definition only be litigated as a class action, and which might arguably require a State-wide class because of the State-wide operation requirements. 45 C.F.R. §305.21 (d) (1994). Such IV-D "rights" would not be created by Congress at all, but by the Secretary of HHS in the regulations defining substantial compliance, which could set any reasonable compliance level consistent with the statutes and their goals. This would entail a new group entitlement concept, vastly different from the property interest which every eligible beneficiary has in public assistance entitlements. This Court should be reluctant to find that Congress has created an entirely novel type of federal group entitlement without an unmistakable expression of such intent.

II.

THE COMPREHENSIVE INTERNAL ENFORCEMENT SCHEME OF TITLE IV-D ESTABLISHES A LEGISLATIVE INTENT TO FORECLOSE PRIVATE ACTIONS UNDER 42 U.S.C. §1983.

This case involves custodial parents' attempt to have the judiciary review the effectiveness of States' child support enforcement programs. Such a request would cause the judiciary to supplant the duties of the Secretary of HHS in overseeing the effectiveness of child support enforcement programs. Congress exclusively delegated these duties to the Secretary of HHS. 42 U.S.C. §652 (1996). These duties were never intended to be superseded by the judiciary through private §1983 enforcement actions.

This Court has repeatedly expressed great concern about the intrusion of the judiciary into the province of the legislative and executive branches. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992), the Court restated the lesson of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The judiciary must be mindful of the constitutional duties exclusively delegated to the other co-equal branches of government and take care not to breach those boundaries by assuming a position of authority over those co-equal branches of government. *Lujan*, 504 U.S. at 576-77.

In assessing whether the internal enforcement mechanisms of a complex federal legislative scheme are sufficiently comprehensive to demonstrate a congressional intent to preclude private §1983 action, the third factor of the private right of action analysis from *Cort v. Ash* and *Merrell Dow* is relevant: would private enforcement actions under §1983 further the underlying legislative

purposes, or would such private enforcement actions conflict with the internal enforcement mechanisms provided by Congress? *Cort v. Ash*, 422 U.S. at 78; *Merrell Dow*, 478 U.S. at 810-12.

The Finance Committee of the U.S. Senate, in the report reviewing the proposed 1984 amendments to IV-D, noted that the previous penalty provision, an automatic 5% reduction in federal AFDC payments after any OCSE finding of noncompliance, was inflexible. S. Rep. No. 98-387, 98th Cong., 2d Sess. 33 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2429. Due to this inflexibility,

> [a]pplication of this penalty has been repeatedly suspended by legislation on the basis that failure to suspend the penalty would penalize some States which actually had effective programs or which had made strong efforts to remedy the non-compliance.

Id.

Congress explicitly expected the triennial audits required by the 1984 amendments to be considerably more extensive than the previous annual audits, and to assess program effectiveness instead of simply checking for technical compliance with State plan requirements. Indeed, the regulatory scheme of 42 U.S.C. §603 (h) as written, and its legislative history, demonstrate that Congress wanted to encourage States to achieve compliance, and thus delegated discretion to the Secretary to approve corrective action periods and suspend reduction in IV-A payments while the State was making satisfactory progress toward substantial compliance.[11] The statute

[11] 42 U.S.C. §603 (h) (1996) places no limit on the length of the corrective action period which the Secretary may autho-
(continued...)

was written so as to exempt States which had brought their programs into compliance by the time OCSE actually issued a finding of noncompliance based on an audit, from any penalty, and to force States which had not voluntarily taken corrective action to do so or suffer loss of IV-A funds.

The IV-D penalty sanction is unlike other internal enforcement schemes which provide for withholding funds from entitlement programs. *See, e.g., Victorian v. Miller*, 813 F.2d 718, 723 (5th Cir. 1987) (*en banc*). The IV-D sanction is expressly tailored so it will *not* have an adverse impact on IV-D services. Further, Congress insisted States must lose IV-A AFDC funds if they fail to achieve substantial compliance in the IV-D program after a corrective action period.

> In view of the changes proposed in the Committee amendment, the penalty provisions of the law will apply only in cases where States not only fail substantially to carry out the requirements of law but also refuse to undertake the necessary changes to correct that situation. For this reason, the Committee cannot foresee any situation in which legislative action to suspend the revised penalties would be appropriate. Accordingly, the Committee would expect to oppose any such efforts to enact waiver legislation.

S. Rep. No. 98-387, 98th Cong., 2d Sess. 33 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2397, 2429.

A penalty is mandatory when the conditions of the penalty statute have been fulfilled. 42 U.S.C. §603 (h) (1)

[11] (...continued)
rize. The Secretary has placed a one-year limitation on corrective action periods by regulation. 45 C.F.R. §305.99 (c) (1994). The follow-up audit covers the first full quarter following the corrective action period. 45 C.F.R. §305.11 (1994).

(1996). The Secretary gives the State written notice of each IV-D requirement found substantially noncomplying, sets the amount of the penalty, and gives notice the penalty may be suspended for a period not to exceed one year, by approval of a corrective action plan submitted with 60 days of the penalty letter. 45 C.F.R. §305.99 (1994).

IV-A payments must be reduced between one and two percent after the first finding of substantial noncompliance, unless the penalty is suspended by approval of a corrective action plan. 42 U.S.C. §603 (h) (1) (1996). For a second consecutive finding of substantial noncompliance, IV-A payments must be reduced between two and three percent, and between three and five percent for a third or subsequent such finding. *Id.*

A corrective action plan must contain the steps necessary to achieve substantial compliance with IV-D requirements within the time period which the Secretary finds appropriate. 42 U.S.C. §603 (h) (2) (1996). There is no administrative appeal of the Secretary's decision to refuse approval of a corrective action plan. 45 C.F.R. §305.99 (1994). If OCSE decides that implementation of the proposed corrective action plan will achieve substantial compliance, and OCSE monitoring of the plan shows that it is being fully implemented and the State is progressing to achieve substantial compliance, the loss of IV-A funds will be suspended for a period not to exceed one year. 42 U.S.C. §603 (h) (2) (1996); 45 C.F.R. §305.99 (1994).

The penalty remains in effect until the Secretary has issued a finding of substantial compliance, despite suspension of the reduction in IV-A payments. During this period, OCSE not only monitors implementation of the

corrective action plan, it must audit all other aspects of the State IV-D program each year the penalty remains in effect. 42 U.S.C. §652 (a) (4) (1996). The monetary sanction is suspended until the Secretary finds that either: 1) the State is not implementing its corrective action plan; or 2) despite implementation of the plan, the State did not achieve substantial compliance, based on a follow-up audit covering the first fiscal quarter after the end of the corrective action period. 45 C.F.R. §305.99 (d) (1994). The OSCE finding of continued substantial noncompliance after a follow-up audit ends the suspension of the monetary sanction, subject to administrative appeal and judicial review. 42 U.S.C. §1316 (1996).

The internal enforcement scheme at issue in *Wright v. Roanoke* was functionally identical to the internal enforcement schemes found in all the entitlement programs of the Social Security Act: individual administrative hearings and federal compliance audits, with the authority to withhold program funds. *Wright v. Roanoke*, 479 U.S. at 428. Except for IV-D, the internal mechanisms for federal enforcement of the Social Security Act program requirements all consist of a general provision, with slight variations, which gives the Secretary authority to stop payment of all or some federal funds to States not complying with program requirements.[12] These mech-

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[12] For example, 42 U.S.C. §304 (1996) (Old-Age Assistance Grants); 42 U.S.C. §503 (b) (1996) (Unemployment Compensation) parallels the structure and procedure of 42 U.S.C. §304, with minor variations directed to this particular program. 42 U.S.C. §604 (a) (1996) is the Title IV-A general grant of authority to stop payment to State programs found to be out of compliance with federal standards by the Secretary. Like 42 U.S.C. §304, the cut in funds may be limited to the offending

(continued...)

anisms for HHS enforcement, like that of HUD at issue in *Wright v. Roanoke*, are in stark contrast to the comprehensive scheme in Title IV-D.

The Family Support Act of 1988 provided, or required the Secretary to provide, very specific remedies for the precise complaints which have been raised in this and every private §1983 action seeking to establish enforceable rights to IV-D services. The Secretary has adequately addressed the failure of State IV-D agencies to take any action on cases (especially paternity cases), and the long delays in taking action. *See Carelli v. Howser*, 923 F.2d 1208, 1215 (6th Cir. 1991); *Wehunt v. Ledbetter*, 875 F.2d 1558, 1561 (11th Cir. 1989). Congress in 1988 set additional paternity performance standards by statute, provided 90% federal funding for paternity testing, and directed the Secretary to set time limits for various IV-D activities. 42 U.S.C. §§652 (g), (h) & (i), and 655 (a) (1) (C) (1988). The legislation shows that Congress intended OCSE to enforce program standards, whether set by statute or regulation, as the remedy for the performance complaints which are the subject of this and similar private §1983 suits.

The comprehensive and vigorous federal enforcement of Title IV-D is reflected in the frequency of penalty notices and corrective action periods. OCSE enforcement has accurately identified the critical areas of IV-D noncompliance, and Congress has provided internal remedies, which OCSE is directed to administer and enforce. 42 U.S.C. §652 (1996).

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[12] (...continued)
parts of the State program. 42 U.S.C. §1204 (Aid to the Blind) recites the same enforcement procedures found in 42 U.S.C. §§304, 503 (b) and 604 (a).

Review of all the State and Territorial IV-D programs since 1975 has given OCSE expert knowledge of the special problems, many of them technical, which exist in the different IV-D programs, the operational and management structure of each program, and the widely varying support enforcement approaches used by each State, depending on State law and governmental organization.[13] Federal enforcement has not only been comprehensive and frequent, but also effective, especially considering the magnitude of the problem IV-D was designed to address. Most States have succeeded in achieving substantial compliance through a corrective action period, and national IV-D collections have increased steadily each year.[14] Congress recognized that national implementation of a network of automated systems, wage withholding, and interstate coordination are the keys to realizing the goals of IV-D. Individual lawsuits will not speed attainment of the tools that the States really need to improve child support enforcement.

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[13] OSCE publishes a "Compendium of State Best Practices" in order to facilitate the sharing of ideas on child support enforcement. A sampling of the best State practices can be found in OCSE's 1994 report to Congress. Child Support Enforcement Nineteenth Annual Report to Congress (1994), U.S. Department of HHS, Administration for Children and Families, OCSE, at pp. 8-10.

[14] Child Support Enforcement Nineteenth Annual Report to Congress (1994), U.S. Department of HHS, Administration for Children and Families, OCSE, at p. 29.

CONCLUSION

For the reasons stated in this brief and in the brief of the petitioner, amici respectfully urge this Court to reverse the decision of the court below.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA J. BLESSING, Director,
Arizona Department of Economic Security,
in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether custodial parents seeking child support payments from noncustodial parents may sue state officials under 42 U.S.C. § 1983 for alleged violations of child support program agreements concluded between the States and the federal government pursuant to Title IV-D of the Social Security Act.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling and con-

tinuing interest in the issue presented here: when federal spending statutes create rights that are enforceable against state and local governments under 42 U.S.C. § 1983.

This case concerns Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 601-617, 651-669, which condition funding for Aid to Families with Dependent Children (AFDC) on the recipient State's creation of a child support enforcement program. In this case, a divided panel of the Ninth Circuit held that Title IV-D confers a right upon custodial parents, cognizable in federal court under Section 1983, to demand that such a program be implemented and operated in a manner that satisfies the plaintiffs.

The Court's decision regarding the existence of enforceable rights under Title IV-D will directly affect *amici* and their members; it will have an immediate effect on the allocation of scarce state resources and on the structure of state child support systems. *Amici* also have a broader interest in the law governing Section 1983 actions that challenge the administration of federal spending programs. For these reasons, *amici* submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT OF THE CASE

1. Under the cooperative federal-state venture created by Title IV-A of the Social Security Act, 42 U.S.C. §§ 601-617, States that have filed plans with the Secretary of Health and Human Services ("the Secretary") "for aid and services to needy families with children" may receive funds for the Aid to Families with Dependent Children ("AFDC") program. 42 U.S.C. § 602(a). Section 602 addresses the content of such plans, indicating that they must contain a number of specified elements; it declares, among other things, that the "State plan * * *

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

must * * * provide that the State has in effect a plan approved under part D of this subchapter and operates a child support program in substantial compliance with such plan." 42 U.S.C. § 602(a)(27). Under Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669, a participating State also must have a "plan for child and spousal support" that provides for the designation or creation of a state unit that will have responsibility for such services as establishing paternity, locating absent parents, and collecting child support. 42 U.S.C. § 654. In addition, Title IV-D provides that participating States "must have in effect laws requiring the use of [specified] procedures * * * to increase the effectiveness of the program which the State administers under this part." 42 U.S.C. § 666(a); *see* 42 U.S.C. § 654(20)(A).

The principal responsibility for child support enforcement is thus left to the States, but the federal government monitors and evaluates state programs. Congress vested authority in the Secretary to promulgate specific regulations implementing the requirements of Title IV-D. 42 U.S.C. § 652. In addition, the Secretary is directed to withhold federal funds from participating States upon a finding that "in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) of this title to be included in the plan." 42 U.S.C. § 604(a)(2). To this end, the Secretary conducts audits at least every three years in which she evaluates substantial compliance across a range of criteria. 42 U.S.C. § 652(a)(4); 45 C.F.R. § 305. For most criteria, substantial compliance is defined to mean no more than 75% compliance. 42 U.S.C. § 652(g)(1); 45 C.F.R. § 305.20(a)(3). If a State is not in substantial compliance, the Secretary must reduce payments to the State, although she has discretion within a specified range as to the amount of the reduction. 42 U.S.C. § 603(h)(1).[2]

[2] Under Section 603(h)(1), payments to the States "shall be reduced (subject to paragraph (2)) by—

The Secretary must suspend the reductions, however, if a State submits a "corrective action plan" that is approved by the Secretary. 42 U.S.C. § 603(h)(2).

2. Petitioner Linda Blessing is the Director of the Arizona Department of Economic Security ("ADES"), Arizona's designated Title IV-D agency. ADES administers the Title IV-D program and provides child support enforcement services both to persons who receive AFDC payments and to those who do not. *See* 42 U.S.C. § 654(6); 45 C.F.R. § 302.33(a). ADES services hundreds of thousands of applicants.[3] In providing assistance to these applicants, ADES requires substantial cooperation both from other branches of the Arizona government and from other States.[4]

The Secretary conducts regular audits of ADES to ensure that it is in substantial compliance with Title IV-D. In response to the 1989 audit, which found certain defects, Arizona submitted a corrective action plan. *See* Defendant's Motion to Dismiss Plaintiffs' Complaint, Ex.

(A) not less than one nor more than two percent, or

(B) not less than two nor more than three percent, if the finding is the second consecutive such finding made as a result of such a review, or

(C) not less than three nor more than five percent, if the finding is the third or a subsequent consecutive such finding made as a result of such a review."

[3] The Secretary's published figures indicate that there were 307,060 open case files in Arizona in 1994, but that number constantly fluctuates as ADES closes old cases and opens new ones. *See* Child Support Enforcement, 19th Annual Report to Congress 48 (1994). The total caseload for all States in fiscal year 1994 was over 18 million. *Id.* at 59, Table 2.

[4] *See generally* 42 U.S.C. § 654(4)(B) (regarding reciprocal arrangements with other States and utilization of federal courts); 42 U.S.C. § 654(7) (regarding cooperative arrangements with courts and law enforcement); 42 U.S.C. § 654(8) (regarding cooperation with other States); 45 C.F.R. § 302.10 (plan may be administered by State or state subdivision).

A-1. After Arizona implemented this plan, the Secretary conducted a follow-up audit and, in September 1994, declared Arizona to be in substantial compliance with Title IV-D. *See* Pet. Cert. Rep. Br., App. 1-3.

On February 22, 1993, respondents filed a class action suit against petitioner under 42 U.S.C. § 1983. Respondents represent a proposed class of approximately 300,000 custodial parents in Arizona who are eligible to receive child support enforcement services under Title IV-D. Respondents sought a declaratory judgment that the operation of Arizona's child support enforcement program violates Title IV-D. They also asked the court for a permanent injunction requiring affirmative measures to achieve and sustain substantial compliance with Title IV-D. The district court granted summary judgment to petitioner, holding that Congress foreclosed any right of action by individuals to enforce Title IV-D. Pet. App. 1b-10b.

A divided panel of the court of appeals reversed. Pet. App. 1a-46a. Applying the test articulated in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), the majority held that Title IV-D creates rights because the statute establishes binding obligations (Pet. App. 14a) that are not too vague or amorphous to apply (*id.* at 18a) and that were intended to benefit respondents. *Id.* at 18a-19a. The majority further held that Congress did not foreclose private judicial remedies, reasoning that the auditing and funding requirements established by Congress do not provide for judicial enforcement and are not sufficiently remedial. *Id.* at 23a-34a.

Judge Kleinfeld dissented. Pet. App. 36a-46a. Analyzing the case under *Suter* v. *Artist M.*, 503 U.S. 347 (1992), Judge Kleinfeld reasoned that "[t]he 'substantial compliance' standard [of 42 U.S.C. § 602(a)(27)] does not 'unambiguously confer' enforceable rights on any individual." Pet. App. 39a. He explained that "Congress, by the use of the word 'substantial,' expressly provide[d]

that enforcement need not be 100%" (*id.* at 39a-40a) and that as a consequence, "[n]o custodial parent can say, under this statute, 'Congress gave me a right to have the state do something in my case which it is failing to do.'" *Id.* at 41a. He therefore found that "[s]tate governments have no reason to suppose, from the text of the statute, that they have to satisfy federal judges as well as the Secretary of Health and Human Services with their child support collection procedures, or else lose AFDC money." *Id.* Judge Kleinfeld concluded that "[i]nferring a private right of action * * * subverts [the statutory] scheme" (*id.* at 45a-46a), in which "Congress gave to the Secretary, not the courts, the authority and discretion to decide whether state governments were substantially complying, and to negotiate plans to bring them into substantial compliance if they were not." *Id.* at 45a.

SUMMARY OF ARGUMENT

1. As an initial matter, the court of appeals went astray in determining the existence of an enforceable "right" through application of the three-part test set out in *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). That test is properly used when the statute at issue imposes unconditional duties directly on a unit of government. But it is not, at least as a general matter, appropriately applied when federal-state funding statutes are asserted to create rights within the meaning of Section 1983. Such funding provisions are "in the nature of a contract." *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). As a consequence, programs like Title IV-D are, in essence, federal-state contracts in which the parties to the agreement have undertaken to assist third-party beneficiaries. And it is most unlikely that the drafters of Section 1983 would have understood the terms of such a contract to create rights enforceable by third party beneficiaries. To the contrary, it was generally accepted at the time of the enactment of Section 1983's predecessor that—with the exception of contracts where

the third party itself offered consideration—such beneficiaries could not sue for the contractual benefits.

2. If Title IV-D does create rights, by its plain terms it guarantees only that participating States will *adopt plans* that contain specified provisions. Nothing in the statute itself requires that States engage in any specific substantive measures. The Court consistently has read federal-state funding statutes in this fashion, holding that they do "place a requirement on the States, but that requirement only goes so far as to ensure that the State ha[s] a plan approved by the Secretary which contains the * * * listed features." *Suter* v. *Artist M.*, 503 U.S. 347, 358 (1992). Here, that conclusion is confirmed by the structure of Title IV-D: by demanding only "substantial compliance" with the state plan, Congress did not assure that any individual would obtain a specific benefit, an absence suggesting that Congress did not intend to create a private remedy.

ARGUMENT

TITLE IV-D OF THE SOCIAL SECURITY ACT DOES NOT CREATE RIGHTS THAT ARE ENFORCEABLE UNDER 42 U.S.C. § 1983

The parties in this case agree that not all violations of federal laws are cognizable under 42 U.S.C. § 1983. Rather, as the Court repeatedly has emphasized, "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law." *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 106 (1989). *See also Suter* v. *Artist M.*, 503 U.S. 347, 357 (1992); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990); *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 28 (1981). The dispositive question here, then, is whether Title IV-D creates a federal "right" that is enforceable under Section 1983. Although the court of appeals purported to ask that question, in our view the

court went fundamentally astray both in identifying the considerations relevant to its answer and in conducting its analysis of those considerations.

I. PROGRAMS CREATED UNDER THE SPENDING CLAUSE GENERALLY DO NOT GIVE RISE TO ENFORCEABLE RIGHTS IN THE PROGRAMS' BENEFICIARIES

A. The court of appeals assumed that the question whether Title IV-D creates rights under Section 1983 should be analyzed by looking to the considerations identified by the Court in *Wilder*: whether the statute was designed to benefit the putative plaintiffs, imposes binding obligations on the defendant governmental unit, and is not " 'too vague and amorphous' [as] to be 'beyond the competence of the judiciary to enforce.' " *Golden State*, 493 U.S. at 106, quoting *Wright* v. *Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 431-32 (1987). When a statute (or constitutional provision) imposes unconditional duties directly on a unit of government, as was true in *Dennis* v. *Higgins*, 498 U.S. 439 (1991) and *Golden State*, we agree that application of the three-part test is appropriate. That approach plainly accords with the intent of Congress when it enacted Section 1983 in 1871. The legislative debates did not address the sorts of statutes that were thought to create "rights."[5] The term, however, had an accepted meaning at the time: rights were understood to embrace those things that could " 'be lawfully claimed' " (Cong. Globe, 42d Cong., 1st Sess. 313 (1871) (remarks of Rep. Burchard (citation omitted)), encompassing "an enforceable claim or title to any subject matter whatever." W. Anderson, *A Dictionary of Law* 905 (1893). While there is an element

[5] That is hardly surprising, since deprivations of rights secured by law were not made actionable under Section 1983's predecessor until 1874. *See Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608-09 (1979).

of circularity to this definition—a right was an enforceable claim, while enforceability of a claim turned on whether it asserted a right—rights plainly were understood to flow from those laws that imposed direct and unconditional proscriptions for the benefit of particular individuals. The courts of the time in fact recognized common law rights of action only under such statutes. *See, e.g., Hayes* v. *Michigan Central R.R. Co.*, 111 U.S. 228, 240 (1884); *Pollard* v. *Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874); T. Cooley, *Law of Torts* 790 (2d ed. 1888).

At the same time, the history suggests that the *Wilder* test should not, at least as a general matter, govern the identification of rights under what the Court has termed "a mere federal-state funding statute." *Pennhurst*, 451 U.S. at 18. As the Court has explained, federal "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* at 17. In particular, a spending program such as Title IV-D is, in essence, a federal-state contract in which the parties to the agreement have undertaken to assist third-party beneficiaries, which in this case include respondents. And it is most unlikely that the drafters of Section 1983 would have understood the terms of such a contract to create rights enforceable by the third-party beneficiaries.

To the contrary, at the time of the enactment of Section 1983 it generally was accepted that—with the exception of contracts where the beneficiary was owed a preexisting duty by the promisee, usually as the result of performance amounting to consideration by the beneficiary —third party beneficiaries could not sue on contracts. As

Story explained long before the enactment of Section 1983's predecessor:

> It is now well settled, as a general rule, though the early cases are quite contradictory on this point, that in cases of simple contract, if one person makes a promise to another for the benefit of a third, although no consideration move from such third person, it is binding * * *. The principal difficulty seems to be in determining in which party the right of action resides. *As between the plaintiff and defendant, there must be a privity of contract,* and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff.

W. Story, *A Treatise on the Law of Contracts Not Under Seal* 82-83 (1844, reprint ed. 1972) (emphasis added) (footnotes omitted).

This proposition was uniformly accepted at the time. Writing almost contemporaneously with the enactment of Section 1983's predecessor, for example, Langdell concluded that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise." C. Langdell, *A Summary of the Law of Contracts* 79 (2d ed. 1880). Langdell also observed "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise," adding that this "proposition is so plain upon its face that it is difficult to make it plainer by argument." *Ibid.*[6] Not surprisingly, then,

[6] This proposition was widely acknowledged. *See, e.g.*, J. Clark Hare, *The Law of Contracts* 193 (1887) ("it is equally well settled, on a principle common to every system of jurisprudence, that the obligation of a contract is under ordinary circumstances confined to the parties, and cannot be enforced by third parties"); 1 F. Hilliard, *The Law of Contracts* 422 (1872) ("In general, the party

this Court recognized "the general rule that privity of contract is required" to support an action for enforcement. *National Bank* v. *Grand Lodge*, 98 U.S. 123, 124-25 (1878).[7]

with whom a contract is made is the proper plaintiff in a suit upon such a contract, although the beneficial interest is in other persons."); *id.* at 426-27 (noting exceptions to rule but affirming that action cannot be maintained "where the contract is made by a sealed instrument"); 1 W. Story, *A Treatise on the Law of Contracts* 509 (M. Bigelow ed. 1874) ("tendency of the courts" in the United States is to hold "that no stranger to the consideration can take advantage of a contract, though made for his benefit"); 2 F. Wharton, *A Commentary on the Law of Contracts* 155 (1882) ("no one can sue on a contract to which he was not a party"); *id.* at 156-57, 162-70. Indeed, it appears that the rights of donee beneficiaries were not established in the United States until well into the twentieth century. *See* K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990).

A similar rule was recognized under English common law in the nineteenth century. Although earlier cases had suggested that a child could sue as a beneficiary under a contract made on its behalf by a parent (*see* A. Farnsworth, *Contracts* § 10.2, at 712 (1982)), that exception was repudiated in 1861 in a case that affirmed the vitality of the rule precluding third parties from recovering on contracts. *Tweddle* v. *Atkinson*, 1 B. & S. 393, 121 Eng. Rep. 762 (1861). As one Lord explained in subsequently reaffirming *Tweddle*, "in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it." *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] App. Case 847, 853. While plaintiffs occasionally may obtain third party contractual benefits in courts of equity, it remains the rule in England that third party beneficiaries generally have no rights at law. *See* A. Farnsworth, *supra*, § 10.2, at 713.

[7] While there were narrow exceptions to this rule, virtually all cases recognizing such exceptions involved plaintiffs who either were related to the promisee or who themselves had performed services amounting to consideration. *See* 2 F. Wharton, *supra*, at 162-63 (discussing seeming exceptions and noting that most can be explained on other grounds than a general right to recovery by unrelated third parties). This accounts for occasional suggestions in the cases that "the right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, * * * is now the prevailing rule in this country." *Hendrick* v. *Lindsay*, 93

B. This background has obvious relevance here. It has long been established, of course,

> that in enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law. "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Will v. *Michigan Department of State Police*, 491 U.S. 58, 67 (1989), quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). And that presumption must be applied with special force when a departure from the common law approach would impose significant obligations or liabilities on the States (*see, e.g., Will*, 491 U.S. at 65-66; *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1990)) —as almost inevitably will be the case if a State's failure to comply with the terms of a spending program is actionable. *See generally Pennhurst*, 451 U.S. at 24-25. Against this background, a Congress that understood rights to be *enforceable* entitlements could not have intended Section 1983 to authorize actions on the part of the third party beneficiaries of spending programs, when such beneficiaries generally were not entitled to seek performance under the common law.

U.S. 143, 149 (1876). In *Hendrick* itself the plaintiff had executed a bond in reliance on a promise by the defendant to another that if the latter secured a bond to delay execution of judgment the defendant would guarantee the issuer against loss. Thus, the plaintiff suing in *Hendrick* essentially had been in privity with the parties to the contract and had provided consideration. *Id.* at 146-48. And, as discussed in text, whatever exceptions existed, the treatise writers of the day—including such leading figures as Story and Langdell—uniformly agreed that the general rule was that only those from whom consideration had moved could themselves sue for performance of a contract.

This analysis is not novel; the Court, and individual Justices, have expressed considerable skepticism in the past about the proposition that spending programs generally create enforceable rights under Section 1983. Noting that the spending provisions there at issue simply regulated the assurances provided by the State to the federal government about the State's use of federal funds, the Court in *Pennhurst* declared it "at least an open question whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." 451 U.S. at 28. And the four dissenting Justices in *Wilder*, explaining that the provision before the Court simply set out one of the requirements for the plan pursuant to which the State would disburse federal funds, concluded that the statute "is addressed to the States and merely establishes one of many conditions for receiving Federal Medicaid funds; the text does not clearly confer any substantive rights on Medicaid services providers." 496 U.S. at 527 (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting). Most recently, the Court reaffirmed the principle that enforceable rights are created by federal-state funding statutes only when such statutes unambiguously impose binding obligations on the States. *Suter*, 503 U.S. at 363.

Having said this, we recognize that the Court applied the *Golden State* test to hold that the spending provision at issue in *Wilder* created rights within the meaning of Section 1983. But that program differed materially from "a typical funding statute" of the sort at issue here. *Pennhurst*, 451 U.S. at 22. The provision before the Court in *Wilder*, the Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A), was part of a federal-state scheme pursuant to which, among other things, hospitals (the plaintiffs in *Wilder*) provided medical services to needy persons; the federal government offered funds to the States, which in turn agreed to use those funds to re-

imburse health care providers for the medical services provided to needy individuals. *See Wilder*, 498 U.S. at 509. The Boren Amendment thus channeled federal funds directly into the hands of third parties—and did so in return for services rendered by those parties. Viewed in contractual terms, the hospitals provided consideration in the form of medical services. And that is precisely the sort of three-party arrangement in which, at the time of Section 1983's enactment, the third party beneficiary would have been permitted to seek enforcement of the contract's terms. *See National Bank*, 98 U.S. at 124 (stating that one "exception" to the general requirement of privity is "where one person contracts with another to pay money" directly to a third); Hare, *supra*, at 193, 197 (recognizing that the principle permitting one who has offered consideration to sue creates an exception to the general requirement of privity). While the Court's decision in *Wilder* concededly did not advert to the common law background in holding that the Boren Amendment created enforceable rights in the hospitals, the decision's analysis and outcome is wholly consistent with Section 1983's history.

That is not true of the holding below. While AFDC recipients may give consideration for their AFDC benefits by assigning their rights to the State, 42 U.S.C. § 602(a)(26), they do not give consideration for child support enforcement services (which are offered to non-AFDC parents on identical terms). Under the common law at the time Section 1983 was passed, a promise had to depend upon the consideration to be enforceable. "To render a consideration valid, it must * * * be the express or implied condition on which the obligation of the promise depends." Hare, *supra*, at 212. *See also, e.g., Kirkpatrick* v. *Muirhead*, 16 Pa. (4 Harris) 117, 126 (1851) ("The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience, recognized by all of them as the moving

cause."). But receipt of child support enforcement services does not depend upon assignment of an applicant's rights to child support. If an applicant decided not to assign her rights to the State, she would lose AFDC funds, but she could still apply for and receive child support enforcement services. 42 U.S.C. § 654(6). Thus, as the framers of Section 1983 would have understood it, while the beneficiaries of Title IV-D may have enforceable rights to the AFDC welfare benefits, they do not have any enforceable rights as third party beneficiaries to the child support enforcement services provided under Title IV-D.[8]

II. TITLE IV-D DOES NOT CREATE A RIGHT TO DEMAND COMPLIANCE WITH THE STATE PLAN THAT IS ENFORCEABLE UNDER SECTION 1983

A. For the foregoing reasons, Title IV-D of the Act does not create rights that are enforceable under Section 1983. If the Court rejects that conclusion, however, it still must determine the nature of the right established by the statute. The court of appeals found that the statutory right is one to the implementation of a state program that is in fact operated in substantial compliance with the State's plan. But that holding cannot be reconciled with the statutory language and structure.

Title IV-A provides that "[*a*] *State plan* * * * *must* * * * *provide* that the State has in effect a plan approved under part D of this subchapter and operates a child support program in substantial compliance with such plan." 42 U.S.C. § 602(a), (a)(27) (emphasis added). Similarly, Title IV-D indicates that "[*a*] *State plan for child and spousal support must provide*" that the State will

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[8] Viewed in terms that would have been familiar to the drafters of Section 1983, the contract is divisible and there is no consideration for the portion of the contract providing child support enforcement services; thus, the beneficiaries have no enforceable right to those services. *See* Hilliard, *supra*, at 249.

undertake various activities. 42 U.S.C. §§ 654(1)-(24) (emphasis added). On its face, the statute requires only that States promulgate individualized plans, approved by the Secretary, that "contain[] the * * * listed features." *Suter*, 503 U.S. at 358. Nothing in the statute itself requires that States engage in any specific substantive measures. If Titles IV-A and -D create any right at all, then, it is the right to have the State draft a plan that contains the requisite provisions.

Needless to say, Titles IV-A and -D should be read according to their plain terms. The Court took just that approach in *Suter*, where it held that a very similar statute "does place a requirement on the States, but that requirement only goes so far as to ensure that the State ha[s] a plan approved by the Secretary which contains the 16 listed features." 503 U.S. at 358. The Court reached a similar conclusion in *Pennhurst*; interpreting a provision requiring that state recipients of federal funds " 'provide * * * assurances' " that the funds would be used in a particular manner (*see* 451 U.S. at 12-14), the Court indicated that any right created by the statute would support a claim only "that the state plan has not provided adequate 'assurances' to the Secretary." *Id.* at 28. *See id.* at 33 (opinion of Blackmun, J.). Similarly, the Boren Amendment at issue in *Wilder* requires States to adopt plans for the reimbursement of hospitals according to rates "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate." 42 U.S.C. § 1396a(a)(13)(A). The four dissenting Justices read the provision to create a right only to the specified findings and assurances (if it created any right at all) —even though the language of that statute imposed considerably more stringent requirements on the States than does Title IV-D. *See* 496 U.S. at 527-28 (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, JJ., dissenting).[9]

[9] After the decision in *Suter*, Congress amended part A of Title XI of the Social Security Act to provide:

> In an action brought to enforce a provision of [the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan [or] specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter* v. *Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter* v. *Artist M.* that section 671(a)(15) of [the Act] is not enforceable in a private right of action.

42 U.S.C. § 1320a-2. Congress explained that the amendment was intended to assure that individuals could bring suit in federal court "to the extent they were able to prior to the decision in *Suter* v. *Artist M.*, while also making clear that there [was] no intent to overturn or reject the determination in *Suter* that the [provision at issue in *Suter*] does not provide a basis for a private right of action." H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 926 (1994). This amendment has no bearing on this case. Congress specifically did not disapprove either the holding of *Suter* or the precedents upon which *Suter* relied. As we explain in text, that authority dictates the outcome here. We note that neither the court of appeals nor respondents in their brief opposing the petition for certiorari suggested that Section 1320a-2 has any relevance in this case—or, indeed, so much as cited the provision.

In fact, it is instructive to compare the statute at issue in *Wilder* with Titles IV-A and -D. In rejecting the dissent's analysis, the *Wilder* Court relied entirely on the statutory language requiring States both to find and to make assurances that their rates were reasonable and adequate. *See* 496 U.S. at 512-15. The Court focused in particular on the findings requirement, explaining that "the only plausible interpretation of the [Boren] Amendment is that by requiring a State to *find* that its rates are reasonable and adequate, the statute imposes the concomitant obligation to adopt reasonable and adequate rates." *Id.* at 514-15 (emphasis in original). The majority accordingly answered the United States' argument that the statute required only the provision of assurances

by observing that "[t]his interpretation ignores the language of the statute that requires a State to *find* that its rates are 'reasonable and adequate * * *.'" *Id.* at 513 n.11 (emphasis in original). Here, in contrast, the assertedly rights-creating provision imposes no such independent obligation on the States; it simply provides that participating States must have plans containing certain provisions. Indeed, the authorization for the federal appropriation under Title IV-A declares flatly that "[t]he sums made available under this section shall be used for making payments to States *which have submitted, and had approved by the Secretary, State plans* for aid and services to needy families with children." 42 U.S.C. § 601 (emphasis added).[10]

B. In nevertheless holding that Title IV-D "creates binding obligations upon the state" to implement its plan satisfactorily (Pet. App. 14a), the court of appeals pointed to several provisions of the statute. We note at the outset that the court's analysis on this point suffers from an overarching defect: by their plain terms, all of these provisions indicate no more than that participating States must "have a plan approved by the Secretary which contains the * * * listed features." *Suter*, 503 U.S. at 358. Beyond that, however, each of the individual points made by the court of appeals is flawed.

First, the court pointed to 42 U.S.C. § 602(a)(27), which indicates that the state plan must provide that the State operates its child support program "in substantial compliance" with its plan. Pet. App. 14a.[11] The court

[10] The *Wilder* Court also relied extensively on the legislative history of the Boren Amendment (*see* 496 U.S. at 515-19), which it found to "demonstrate[] clearly that Congress and the States both understood the Act to grant health care providers enforceable rights" (*id.* at 518), adding that the legislative history was "replete with indications that Congress intended that States actually adopt rates that are 'reasonable and adequate.'" *Id.* at 515 n.13. The court of appeals pointed to no such indications in the legislative history of Titles IV-A and -D, and we are aware of none.

[11] The court of appeals did not suggest that Section 602(a)(27) creates binding rights because it indicates that the state plan must provide that the State "has in effect a plan." In this, the court plainly was correct; in *Suter* the Court held that virtually identical language did not create binding rights. *See* 503 U.S. at 359.

itself noted, however, that "[a]t first blush, one might assume that the phrase 'substantial compliance' is no more concrete and unambiguous than the 'reasonable efforts' phrase found problematic in *Suter*." *Ibid.* Equally to the point, virtually identical language in *Suter*—providing for the withdrawal of federal funding upon a finding by the Secretary that " 'there is a substantial failure' in the administration of a plan" (503 U.S. at 360 (citation omitted))—was found not to create binding obligations on the State. *See ibid.*[12]

Second, the court of appeals pointed to 42 U.S.C. § 654, which "sets out at length the specific provisions which must be included in a state plan for child and spousal support." Pet. App. 15a. But that hardly distinguishes this case from *Suter*, where the state plan had to include "16 listed features." 503 U.S. at 358. *See id.* at 359 n.10 (provision does not give rise to cause of action where it "is merely another feature which the state plan must include to be approved by the Secretary").

Third, the court of appeals observed that 42 U.S.C. § 666 "sets forth explicit administrative procedures that a state must establish and implement to ensure the effectiveness of its program." Pet. App. 16a. But the court drew precisely the wrong conclusion from this provision. Section 654(20) declares that a state plan must "provide, to the extent required by section 666 of this title, that the State (A) shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section, and (B) shall implement the

[12] To the contrary, the Court found that the "substantial failure" provision actually cut against the recognition of a right of action under Section 1983: it showed "that the absence of a remedy to private plaintiffs under § 1983 does not make the 'reasonable efforts' clause a dead letter." 503 U.S. at 360-61.

procedures which are prescribed in or pursuant to such laws." Section 666, in turn, provides that "[i]n order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the use of" specified procedures. This provision requires only that certain laws be in effect, and there is no suggestion that Arizona has failed to comply with that requirement.

Perhaps more fundamentally, Section 666 is the *only* provision requiring specific action by participating States. And even so, while Section 666 declares that laws must be in effect to satisfy Section 654(20)(A), it does *not* indicate that the State actually must "implement the procedures which are prescribed in or pursuant to such laws" to satisfy Section 654(20)(B). The structure therefore strongly suggests that binding requirements are not otherwise imposed on the States. This is plainly a case where "[t]he language of other sections of the Act * * * shows that Congress knew how to impose precise requirements on the States aside from the submission of a plan to be approved by the Secretary when it intended to." *Suter*, 503 U.S. at 361 n.12.

Fourth, the court of appeals observed that "the statute also sets forth detailed criteria for measuring compliance with the statute." Pet. App. 16a, citing 42 U.S.C. § 652(g). But while this provision offers the Secretary guidance in determining when to limit the release of federal funds, the court nowhere explained why it has any bearing on the question whether Title IV-D creates binding obligations. After all, as we already have explained, a similar substantive provision—allowing the Secretary to withhold funds when " 'there is a substantial failure' in the administration of a plan"—was held in *Suter* not to give rise to enforceable rights. 503 U.S. at 360.

C. 1. This last element of the statute—its declaration that "substantial compliance" with its paternity establishment program generally is achieved when a State's "paternity establishment percentage" equals or exceeds 75%

(*see* 42 U.S.C. § 652(g))—points up a basic defect in the court of appeals' analysis. When viewed against the background of the statutory structure, the "right" asserted by respondents is quite a peculiar one. While respondents seek to change the way in which Arizona's child support program is administered, they cannot claim that their individual treatment at the State's hands violated federal law. To the contrary, as Judge Kleinfeld noted, "Congress, by the use of the word 'substantial,' expressly provide[d] that enforcement need not be 100%"; thus, "[n]o custodial parent can say, under this statute, 'Congress gave me a right to have the state do something in my case which it is failing to do.' " Pet. App. 39a-40a, 41a. Surely this "absence of any assured private benefit from the remedy suggests that no private remedy was intended by Congress." *Id.* at 44a-45a.

In contrast, the Court has permitted Section 1983 claims alleging violations of federal-state funding statutes only when the provisions granted particular benefits to specific individuals. In *Wilder*, for example, hospitals alleged the denial of specific benefits, specifically owed to them: sufficient reimbursement for medical services rendered under the Medicaid Act. *See* 496 U.S. at 503. *See also Wright*, 479 U.S. at 419 (addressing claim that public housing authority overbilled plaintiffs for utilities, violating rent ceiling imposed by relevant statute); *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) (addressing claim that Maine deprived plaintiffs of welfare benefits by calculating amount owed in manner that violated relevant statute).

Here, respondents have a considerably more amorphous complaint: that Arizona's program is not sufficiently effective as a general matter. Thus, their principal allegations broadly challenge the "Structure, Operation, and Performance of the Title IV-D program in Arizona." Complaint, part VI(B). To remedy "ineffectiveness" on such a broad scale would, of course, require significant judicial oversight and intervention. The relief requested

in this case reflects that fact. Respondents ask the Court to enjoin the State, not from any specific action, but "from engaging in this pattern and practice of noncompliance and requiring affirmative measures to achieve and maintain substantial compliance with federal law." Pet. App. 7a. The suit thus was brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. It is difficult to conceptualize such an action as one seeking to effectuate individual rights.

2. Indeed, the structure of Title IV-A and -D strongly indicates that Congress did not have individual rights in mind when enacting the statute. Thus, Title IV-D makes use of an intricate enforcement scheme through which the Secretary works with the States to achieve substantial compliance with the requirements of Title IV-D. 42 U.S.C. §§ 604, 652. Only the Secretary is authorized to determine when a State is in substantial compliance. 42 U.S.C. § 652. Furthermore, the Secretary has discretion to determine when to suspend penalties based on a State's corrective action plan. *Ibid.* This discretion allows the Secretary to work with the States in a cooperative fashion to achieve compliance while ensuring that other congressional goals are achieved by maintaining state participation.

Yet federal court supervision, a necessary result of private actions for general enforcement of Title IV-D, inevitably would interfere with the Secretary's role. Indeed, judicial oversight risks subjecting States to obligations beyond those required by the Secretary. For example, the Secretary already has declared Arizona to be in substantial compliance with Title IV-D. Pet. Cert. Rep. Br. App. 1-3. Any determination by a court that the State has further obligations as a condition of funding would be contrary to this decision.

This structure may well establish "a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose remedies under § 1983." *Suter*, 503 U.S. at 360; *see id.* at 360 n.11. And whether or not that is so, it plainly demonstrates that Congress was concerned, not with individual rights, but with the creation of a cooperative federal-state relationship in which the Secretary would have substantial enforcement discretion. Thus, as Judge Kleinfeld explained,

> The law at issue says, in substance, that states are supposed to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough.
>
> What this lawsuit seeks to accomplish is to lodge the power to decide if states are trying hard enough, and whether their plans to try harder are good enough, in federal judges instead of the Secretary of Health and Human Services. That is contrary to what Congress did. If plaintiffs win the injunction they seek, then probably the district judge will, if the case is handled like many agency continuing inspection cases, appoint a standing master to supervise enforcement. The master will recommend to the district judge how many attorneys and investigators the attorney general should hire and how rapidly the assistant attorneys general should conclude each step of a case. The state will be required to spend however much money it costs to do what the district court decides would achieve "substantial compliance."

Pet. App. 37a-38a.

As this discussion suggests, bringing States into substantial compliance involves balancing a multiplicity of state and federal interests. Child support enforcement is only one of many aspects of the AFDC program.[13] The

[13] The requirement that a State have a plan in conformity with Title IV-D is only one of 45 paragraphs detailing what a State's

Secretary must balance the interest in compliance with Title IV-D against the program's other goals. Reducing funding to the States, or making obligations so onerous that States decide not to participate, risks sacrificing these goals. Yet as Judge Kleinfeld noted, "[u]nlike the Secretary, [federal judges'] decisions cannot be made in a political process, informed by considerations of cost, benefit, and competing claims for money." Pet. App. 37a.

3. Similarly, the notion that Title IV-D creates individual rights cannot be squared with a related aspect of the statutory scheme: Congress's decision to give States substantial flexibility in designing—and, when state plans are ineffective, in fixing—their programs. As discussed above, Title IV-D establishes enforcement through federal-state cooperation, in which the States have the basic responsibility for child support enforcement. In this cooperative scheme, if the Secretary finds a State not to be in substantial compliance, the State may avoid penalties by submitting a corrective action plan that gains the Secretary's approval. 42 U.S.C. § 603(h)(2)(A). Thus, the State is given substantial discretion regarding what corrective actions it will take.

This discretion is crucial to the States, which must balance the needs and priorities of the entire state government. Among other things, States must consider questions of internal government structure. For example, although Title IV-D requires States to establish expedited processes for obtaining and enforcing support orders and establishing paternity, the statute leaves it up to the States to determine whether these processes will be administrative or judicial. 42 U.S.C. § 666(a)(1). States also must coordinate with other branches of the government,

AFDC plan must include. 42 U.S.C. § 602(a). Among other things, States also must include plans for foster care and adoption assistance, 42 U.S.C. § 602(a)(20), and must guarantee child care, 42 U.S.C. § 602(g).

with local governments, and with governments of other States.[14] And obviously, administering Title IV-D includes significant financial considerations.[15] States must balance the needs of other agencies and programs as well as the tax consequences to their citizens. Respondents would eliminate this flexibility from the system.

Needless to say, federal court intervention also defeats the choices made by States when they opted to participate in Title IV-D. Because the maximum statutory penalty for noncompliance is a five percent reduction in AFDC funds, Title IV-D presents the choice of establishing a substantially complying child support enforcement program, or giving up that portion of the State's AFDC funding. Yet one reason the court below determined that a Section 1983 action must be available is that a State could " 'rationally' decide that it is less expensive to lose 1 to 5% AFDC funds than to make the necessary expenditures to meet the federal requirements." Pet. App. 33a. That observation demonstrates that the court fundamentally missed the point: the reason that federal-state funding statutes do not unconstitutionally infringe upon state sovereignty is that States *do* have this choice. *See South Dakota* v. *Dole*, 483 U.S. 203 (1987).

D. The statutory language and structure are clear enough. But even if they are ambiguous on the question whether Title IV-D requires more than promulgation of an appropriate plan, that ambiguity is fatal to respondents' claim. As the Court has held repeatedly,

[14] *See, e.g.*, 42 U.S.C. § 654(4)(B) (regarding reciprocal arrangements with other States and utilization of federal courts); 42 U.S.C. § 654(7) (regarding cooperative arrangements with courts and law enforcement); 42 U.S.C. § 654(8) (regarding cooperation with other States); 45 C.F.R. § 302.10 (plan may be administered by State or State subdivision).

[15] The States spent over $815 million in 1994 on child support enforcement in administrative expenses alone. Child Support Enforcement, Nineteenth Annual Report to Congress at 81, Table 24.

> [t]he legitimacy of Congress' power to legislate under the spending power * * * rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

Pennhurst, 451 U.S. at 17 (1981) (internal citations and quotation marks omitted). *See Suter*, 503 U.S. at 356. *Cf. Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985). Here, "[c]areful examination of the language relied upon by respondents, in the context of the entire Act," should lead the Court "to conclude that the [statutory] language does not unambiguously confer an enforceable right upon the Act's beneficiaries." *Suter*, 503 U.S. at 363. That conclusion should end this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR YOUTH LAW, ASSOCIATION FOR CHILDREN FOR ENFORCEMENT OF SUPPORT, CATHOLIC CHARITIES USA, CENTER FOR LAW AND SOCIAL POLICY, CHILDREN NOW, CHILDREN'S DEFENSE FUND, NATIONAL ASSOCIATION OF CHILD ADVOCATES, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The National Center for Youth Law ("NCYL") is a San Francisco-based private non-profit organization providing legal assistance on issues affecting poor children. NCYL's top priorities include assuring adequate economic support for children and their families. Child support is a vital source of income for many children living in or near poverty, helping custodial families meet their children's needs and attain economic self-sufficiency.

The Association for Children for Enforcement of Support ("ACES") is a nationwide, grassroots organization of parents and children seeking to improve children's lives through timely and adequate child support collection. ACES has 350 chapters in 47 states with 35,000 members across the nation.

Catholic Charities USA ("Catholic Charities"), the oldest and largest network of private social services agencies, serves over 11 million people, the vast majority of whom are single mothers and their children. Local Catholic Charities agencies work to improve the lives of these children in a variety of ways, including supporting efforts to improve child support enforcement, a key to assuring children adequate financial support.

The Center for Law and Social Policy ("CLASP") is a national public interest law firm which specializes in issues affecting low-income families. As part of this work, through its research, writing, training, and litigation, CLASP has long advocated improved paternity establishment and child support enforcement as a means of both promoting paternal

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[1]Counsel for both Petitioner and Respondents have consented to the filing of this brief pursuant to Rule 37. Letters indicating consent have been filed with the Clerk of the Court.

responsibility and improving the economic and emotional lives of children. From its experience in this area, CLASP believes that, if custodial parents and their children are precluded from suing state officials who provide inadequate child support services, state performance will be worse than it now is and children will suffer.

Children Now is a nonpartisan policy and advocacy organization for children. One of its top priorities is to promote children's healthy growth and development. Adequate financial support is necessary to meet children's nutritional, housing, health, and other basic needs. For millions of children nationwide, child support determines both their present quality of life as well as their future prospects.

The Children's Defense Fund ("CDF") exists to provide a strong and effective voice for all the children of America, who cannot vote, lobby, or speak for themselves. CDF pays particular attention to the needs of poor and minority children and those with disabilities. CDF works to assure that all families have adequate income to meet their children's needs, and effective child support enforcement is essential to attain that goal.

The National Association of Child Advocates ("NACA") works to secure the safety, health, and education of all America's children by building and strengthening state- and community-based child advocacy organizations. NACA's independent member organizations advocate for children in more than 40 states and communities, voicing the needs of the most vulnerable citizens to policy-makers, the media, and the general public. NACA and its members believe that the alleviation of child poverty and the improvement of child well-being should be this nation's foremost priorities. Effective child support enforcement is critical to meeting those goals.

The National Association of Counsel for Children ("NACC") is a nonprofit association of attorneys, judges, and

other professionals involved with children and the legal system. NACC was founded in 1977 and maintains membership is all 50 states, the District of Columbia and numerous foreign countries. The mission of the NACC is to enhance the welfare of children by promoting excellence in the field of children's law.

SUMMARY OF ARGUMENT

Amici National Center for Youth Law, Association for Children for Enforcement of Support, Catholic Charities USA, Center for Law and Social Policy, Children Now, Children's Defense Fund, National Association of Child Advocates, and National Association of Counsel for Children seek to have this Court affirm the Ninth Circuit Court of Appeals and, in particular, ask this Court to hold that Congress intended the child support enforcement service requirements of Title IV-D of the Social Security Act, 42 U.S.C. §§ 651 *et seq.*, to be enforceable by children and their families in a Section 1983 action. Child support payments are critical to the well-being of millions of the nation's children. Congress has repeatedly expressed concern, over the two decade history of Title IV-D, about the inadequacy of child support collection, and has repeatedly amended the statute to add ever more stringent requirements for state agencies, to improve their enforcement tools and increase federal funding, and to reiterate the importance to *children* of effective child support enforcement. It is clear that children are intended beneficiaries of Title IV-D, and that Congress intended its strict and detailed requirements for child support services to be mandatory and enforceable against the state officials.

Moreover, Congress structured Title IV-D so as to give state agencies exclusive powers to locate noncustodial parents

and to collect support otherwise unavailable to parents, and to require many custodial families to assign their support rights to the state. It would make no sense for Congress to create a statutory scheme that compels families to rely on the state IV-D agencies for enforcement services, but not intend to make those agencies accountable to the families they serve.

Petitioner's arguments that an enforceable right to child support services would impose excessive costs on the states and generate a flood of litigation are baseless. States actually *make money* from the IV-D system. In the federal circuits that have recognized families' rights to enforce the requirements of IV-D, there has been no flood of litigation, not even a trickle.

ARGUMENT

I. CHILD SUPPORT IS CRITICAL TO THE WELL-BEING OF MILLIONS OF CHILDREN

Single parents with children (custodial parents) have sued Petitioner for failure to provide timely child support services, as mandated by federal law. The prompt and steady availability of child support services is critical to attaining a minimal level of economic security for millions of children in the United States.

The percentage of American children growing up in single-parent families has increased dramatically in the last three decades. It has been projected, based on current trends, that the *typical child* born in the 1980s will spend a significant portion of his or her childhood living in a single-parent household.[2]

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[2]House Comm. on Ways and Means, Overview of Entitlement Programs, H.R. Doc. No. 9, 102d Cong., 2d Sess. 958

Most children growing up in single-parent households are significantly poorer than children in two-parent households.[3] However, child support payments can make a dramatic difference in children's lives. For example, in 1991 single-parent households in which the children did not have a support order had a mean annual income of $13,283; those in which the children had a support order and received at least some support had a mean income of $17,411; and those in which the children had a support order and received all the support due had a mean income of $20,050.[4]

This difference in income has very real consequences for children's health and safety. A recent survey of custodial mothers who had problems collecting child support payments shows that these families had trouble affording adequate shelter, food, health care, and child care, even when the mother worked full-time or more. In the first year after the parents separated, almost half the families surveyed faced a housing crisis which forced them to move in with friends or other family members; and ten percent actually became homeless at some

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(1991).

[3]"In 1992, nearly 46 percent of the 8.2 million families maintained solely by the mother with children under 18, had incomes below the poverty threshold." House Comm. on Ways and Means, Overview of Entitlement Programs, H.R. Doc. No. 27, 103d Cong., 2d Sess. 458 (1994). By contrast, only nine percent of two-parent families with children are poor. *Id.* at 1146-47, tbl. G-33.

[4]U.S. Bureau of the Census, *Child Support for Custodial Mothers and Fathers: 1991,* Current Population Rep., Series P-60, No. 187, tbl. B (1995).

point.[5] Such moves can severely disrupt children's lives, causing them to change schools and lose contact with relatives and friends. Thirty-two percent of the mothers in the survey reported that their children went hungry at some point during the year; 55 percent reported that their children no longer received regular health check-ups; 36 percent reported that their children had not received medical care when they became ill; and 26 percent reported that they had to leave their children unsupervised while they were at work.[6] In each case, the reason cited was lack of money.

The National Commission on Children, established by Pub. L. 100-203 (1987) "to serve as a forum on behalf of the children of the nation," has described some of the effects of poverty on children:

> Many poor children go undernourished, are inadequately clothed, and live in substandard housing. For them, the world is often a dangerous and threatening place to grow up. It is crime-ridden streets where schools and playgrounds are the domain of gangs and drug dealers, or it is desolate rural areas without adequate roads and running water. It is dilapidated homes with broken windows, poor heating, lead paint, rats and garbage. It is a world in which children grow up afraid and ashamed of the way they live.
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> National Commission on Children, *Beyond Rhetoric: A New American Agenda for Children and Families* 29 (U.S. Gov't Printing Office 1991).[7]

Child support not only helps shield children from the harsh effects of poverty, but also can be a critical factor in maintaining the relationship between noncustodial parents -- usually fathers -- and their children. Fathers who pay support are much more likely to see their children on a regular basis, providing moral, intellectual, and emotional support to them, as well as financial assistance.[8] Receipt of support can increase educational opportunities, enhance a child's behavioral and cognitive development, and improve the quality of parent-parent and parent-child relationships by reducing conflict

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[5]Paula Roberts, *Childhood's End: What Happens to Children When Child Support Obligations Are Not Enforced* 7 (National Child Support Assurance Consortium 1993). Representative groups of parents in New York, Georgia, Ohio and Oregon were sampled.

[6]*Id.* at 6.

[7]*See also* Marian Wright Edelman, *Introduction* to Arloc Sherman, *Wasting America's Future: The Children's Defense Fund Report on the Costs of Child Poverty* xvii (Beacon Press 1994), cataloguing studies of the effects of poverty on children ("Child poverty stalks its survivors down every avenue of their lives. It places them at greater risk of hunger, homelessness, sickness, physical or mental disability, violence, educational failure, teen parenthood, and family stress . . .").

[8]Wallerstein and Huntington, *Bread and Roses: Nonfinancial Issues Relating to Fathers' Economic Support of Children Following Divorce*, in The Parental Child-Support Obligations 135, 149 (J. Cassetty ed. 1983) ("child support is unquestionably one of the major strands in the relationship between fathers and children during the years following divorce"); Furstenberg, *et al., The Life Course of Children of Divorce: Marital Disruption and Paternal Contact*, 48 Am. Soc. Rev. 656, 665 (1983) ("fathers who pay some support are much more likely to see their children on a regular basis").

between parents.[9] On the other hand, children's loss of ties with their fathers can lead to emotional disorders, delinquency and crime, adolescent pregnancy, and other social ills.[10]

Our nation has an enormous stake in having an effective child support system that helps to ensure the economic stability of single-parent families, and facilitates responsible fatherhood and maintenance of close ties between noncustodial parents and their children. This Court has long recognized that child support is "an essential right" for children, *Gomez v. Perez,* 409 U.S. 535, 538 (1973); *see also Mills v. Habluetzel,* 456 U.S. 91, 97, 101-02 (1982), and that "[o]ur Anglo-American tradition accords a special sanctity to the support obligation," *Rose v. Rose,* 481 U.S. 619, 637 (1987) (O'Connor, J., concurring).

II. CHILDREN ARE INTENDED BENEFICIARIES OF TITLE IV-D SERVICES

Amici in support of Petitioner assert that children are not the "especial beneficiaries" of Title IV-D[11] and therefore do not satisfy the Section 1983 test laid out in *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987) and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). This argument is refuted by the plain language of the statute, its legislative history, and the policy statements of the federal Office of Child Support Enforcement (hereafter "OCSE").[12]

To achieve its goal of assisting children in single-parent households, Congress has created a highly detailed statutory and regulatory scheme requiring specific services to be provided within set time limits for each and every case. State IV-D agencies must "perform in a cost-effective and efficient manner to *secure support for all children who have sought assistance in securing support.*"[13] The statutes and regulations setting out the required activities and the time limits are detailed in Respondents' Brief on the Merits.

Beginning with the passage of Title IV-D of the Social Security Act in 1975,[14] and continuing through the recent

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[9]Valerie King, *Nonresident Father Involvement and Child Well-Being: Can Dads Make a Difference?*, 15 J. of Fam. Issues 78, 91 (1994).

[10] David Blankenhorn, *Fatherless America* 1 (Basic Books 1995).

[11]Illinois, *et al.* Amicus Brief (hereafter "Illinois Br.") at 6-12; American Public Welfare Association, *et al.* Amicus Brief (hereafter "APWA Br.") at 27 n. 70; National District Attorneys Association, *et al.* Amicus Brief (hereafter "NDAA Br.") at 25-26. It is worth noting that Petitioner ostensibly concedes that children are among the beneficiaries of Title IV-D. Petitioner Brief on the Merits (hereafter "Pet. Br.") at 13.

[12]OCSE is a separate unit within the U.S. Department of Health & Human Services charged with oversight of the state IV-D programs and mandated by federal law. 42 U.S.C. § 652(a) (West Supp. 1996), *amended by* the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105, 2216, 2223, 2230, 2233-34, 2238-39, and 2259. Note, actual statutory and section references to amendments in the Act will be cited only when pertinent. In all other cases, only page numbers to the Public Law will be cited.

[13]42 U.S.C. § 658(a) (West 1991) *amended by* the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. at 2231 (emphasis added).

[14]Social Services Amendments of 1974, Pub. L. 93-647, 88 Stat. 2337 (1975).

enactment of the Personal Responsibility Act in August 1996,[15] Congress has consistently stated its desire to benefit children through the IV-D system. The Senate Report on the original legislation emphasized the interests of children, including "the right to receive support from their fathers"; "the right to have their fathers identified so that support can be obtained"; and the "right to support, inheritance, and to know who [their] father is."[16] As Senator Nunn eloquently testified: "[T]he biggest beneficiaries of this bill are some of the country's most neglected children who have been wantonly deprived of their rightful support by deserting fathers."[17]

Senator Nunn described Title IV-D as "a bill of rights for children -- the right of every child to have some identity, the right of every child to have paternity established in a fair and efficient manner, and the right of every child to support from his natural parents."[18] Title IV-D was enacted as "necessary legislation aimed at providing relief for the millions of women and children who are victimized by the nonpayment of child

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[15]Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (to be codified in scattered sections of 42 U.S.C.) (hereafter "PRA").

[16]S. Rep. No. 1356, 93d Cong., 2d Sess., at 42, 51-52 (1974).

[17]121 Cong. Rec. 26541 (1975) (statement of Senator Nunn). Senator Nunn's testimony occurred several months after enactment of Title IV-D and concerned S. 2081 (1975), a child support bill similar to the Social Services Amendments of 1974, but not enacted.

[18]*Id.*

support."[19]

Ten years later, in amending Title IV-D through the Child Support Enforcement Act of 1984, Congress made clear that "there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program; [and] Congress is strengthening that program to *recognize the needs of all children.*" Pub. L. 98-378, Sense of Congress § 23(2), (3) (1984) (emphasis added). The legislation was designed to carry out "the larger societal responsibility for making sure that all children receive financial support from both their parents to the fullest extent possible." H. R. Rep. No. 527, 98th Cong., 1st Sess., at 29-30 (1983).

Senator Dole, then Chairman of the Senate Finance Committee, emphasized that the chief objective of the IV-D program is not welfare cost savings, but to benefit children: "It is important to remember that the Federal-State child support enforcement program is designed not to produce revenue for the States and local jurisdiction -- or for the Federal Government. The goal of this program is to collect child support for children . . . . This bill . . . will help to strengthen that partnership *for the good of all children.*" 130 Cong. Rec. 9843 (1984) (emphasis added).

Just this year, Congress reiterated its objectives for the child support program: "The proposal is designed to ensure that children receive the support they are due on time and in full by achieving three major goals: establishing uniform State tracking procedures; taking strong measures to establish paternity . . . and ensuring tough child support enforcement." H. R. Rep. No. 651, 104th Cong., 2d Sess., at 1324 (1996). "*The fundamental goal of these [state IV-D] programs, of course, is to increase the financial security of children who live*

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[19]129 Cong. Rec. 33037 (1983) (statement of Rep. Biaggi).

with one parent. This goal enjoys nearly universal support among members of Congress and among the American public." *Id.* at 1440 (emphasis added).

OCSE also recognizes that its role and the role of the IV-D program are to serve children. Its mission statement is: "To assure that assistance in obtaining support (both financial and medical) is available to children through locating parents, establishing paternity and support obligations, and enforcing those obligations." OCSE, *Child Support Enforcement: Strategic Plan for FY 1995-1999* 2 (Feb. 28, 1995). Likewise, its vision statement is to "*put children first* by helping parents assume responsibility for the economic and social well-being, health and stability of their children." *Id.* (emphasis added).

III. THE EXCLUSIVE ENFORCEMENT POWERS GIVEN TO STATE AGENCIES AND THE MANDATED ASSIGNMENT OF SUPPORT RIGHTS ARE PROOF OF CONGRESS' INTENT TO CREATE AN ENFORCEABLE RIGHT TO SUPPORT ENFORCEMENT SERVICES

Congress chose to provide state IV-D agencies with exclusive access to certain key tools for enforcement against noncustodial parents. These tools are not available to parents and private attorneys seeking to collect child support. It would make little sense for Congress to give such exclusive powers to state agencies -- in effect compelling families to rely on these agencies -- but not intend the service requirements of IV-D to be enforceable.

For example, Congress has required state agencies to search for noncustodial parents and/or their assets through the Federal Parent Locator Service (which contains confidential location information from federal agencies that is inaccessible

to families outside the IV-D system) and through other sources, such as telephone companies; the U.S. Postal Service; financial references; unions; police, parole, and probation records, if appropriate; and state agencies and departments as authorized by state law, including those which maintain records of public assistance, wages and employment, unemployment insurance, income taxation, drivers' licenses, vehicle registration, and criminal records. 42 U.S.C. § 653 (West 1991), *amended by* PRA, 110 Stat. at 2214-18, 2220, 2237-38, 2250-51, and 2259; 42 U.S.C. § 654(8) (West Supp. 1996), *amended by* PRA, 110 Stat. at 2218 and 2259; 45 C.F.R. § 303.3(b)(1). This arsenal of search methods is unavailable outside the IV-D program, and most of the information cannot be used by private investigators because of its confidentiality.

Likewise, some of the most effective collection methods, such as federal and state tax refund intercepts, withholding of unemployment or disability benefits, and license revocation, are only available through state IV-D agency action. Additionally, when all state agency efforts have failed, the agency can request "full collection services" from the U.S. Treasury. 42 U.S.C. § 652(b) (West Supp. 1996) *amended by* PRA, 110 Stat. at 2200; 45 C.F.R. § 303.71.

Moreover, in order to receive services from the IV-D agency, many custodial families must surrender legally cognizable interests. If the children receive benefits under Title IV-A (formerly Aid to Families with Dependent Children) of the Social Security Act, the custodial family must assign its right to receive child support,[20] including the right to accrued

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[20]42 U.S.C. § 602(a)(26) (West Supp. 1996). The Personal Responsibility Act continues this assignment. PRA § 103 *amending* Social Security Act § 408(a)(3), 42 U.S.C. § 608(a)(3), 110 Stat. at 2135.

and unpaid support, to the state.[21]

Thus, all custodial parents essentially are compelled by the Title IV-D system to give up control of their child support cases to the state. Families receiving Title IV-A benefits must assign their child support rights, and are thus precluded from pursuing the noncustodial parent independently. Other families formally retain this right, but do not have access to the arsenal of search and collection methods with which Congress has armed the state IV-D agencies.

IV. THE HISTORY OF CONGRESSIONAL RESPONSE TO THE PROBLEMS OF STATE CHILD SUPPORT SYSTEMS SHOWS CONGRESS' INTENT TO IMPOSE ENFORCEABLE MANDATES

The evolution of Title IV-D over the past two decades reveals recurring Congressional concern over the failures of state agencies to comply fully with their statutory duties, and repeated amendments to impose more detailed and clearer requirements on these agencies. This history indicates Congress' intent that its directives to state IV-D agencies be mandatory and enforceable. Over the course of Title IV-D's history, Congress has systematically demolished barriers to effective child support enforcement that existed in state IV-D programs in order to further protect children.

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[21]*See, e.g., Wisconsin v. Chamberland*, 361 N.W.2d 814, 818 (Minn. 1985) ("The assignment extinguished any right [the custodial parent] had to recover arrearages on her own behalf"); *County of Santa Clara v. Support, Inc.*, 89 Cal. App. 3d 687, 152 Cal. Rptr. 754 (1979) (custodial parent cannot independently collect accrued support assigned to the state).

As Senator Dole, then Chairman of the Senate Finance Committee, observed: "[A]lthough the Child Support Program has been operating with some success for a number of years, data indicate that child support is largely being ignored and the economic well-being of children is suffering . . . . Clearly, the State programs must be reformed -- to do a better job of collecting the support that is owed to children . . . ."[22] Congress has recently revisited the problems of the child support program and has provided yet more tools to the state IV-D agencies.[23]

Despite ever stricter mandates, enhanced enforcement tools, and substantial federal funding,[24] difficulties with child support collection remain. "In 1992 only 54 percent of single parent families with children had a child support order established and of that 54 percent, only about one-half received the full amount due."[25] Currently, 44 percent of families nationwide in the IV-D system lack any support orders.[26]

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[22]130 Cong. Rec. 9841-42 (1984).

[23]*See, e.g.*, PRA § 313 *adding* Social Security Act § 453a, 42 U.S.C. § 653a, 110 Stat. at 2209-12 (new hire registry must be developed by all states); PRA § 369 *amending* Social Security Act § 466(a), 42 U.S.C. § 666(a), 110 Stat. at 2251 (license suspension for delinquent noncustodial parents); PRA § 365 *amending* Social Security Act § 466(a), 42 U.S.C. § 666(a), 110 Stat. at 2250 (work requirement for delinquent noncustodial parents).

[24]For a discussion of federal funding of the IV-D program, see Section V, *infra*.

[25]PRA § 101(4), 110 Stat. at 2110.

[26]U.S. Department of Health and Human Services, *Child Support Enforcement: Nineteenth Annual Report to Congress* 33 (1995) (hereafter "*Nineteenth Annual Report*").

Furthermore, "[o]f the cases enforced through the public child support enforcement system, only 18 percent of the caseload has a collection."[27] More than $35 *billion* in unpaid support remains uncollected.[28]

However, the task of collecting child support is not impossible, and Congress' requirement that all states provide specified enforcement services is not unreasonable. "In the 13 years from 1980 to 1993, the [IV-D] caseload has more than tripled, the number of paternities established has almost quadrupled, the number of orders established has increased almost three times, and the number of noncustodial parents located has grown sevenfold." Congressional Budget Office, *CBO Papers: The Changing Child Support Environment* 27 (Feb. 1995) ("hereafter "*CBO Report*").[29]

V. STATES GENERATE REVENUE THROUGH EFFECTIVE OPERATION OF IV-D PROGRAMS

Petitioner and Amici seek to bolster their argument that federal child support standards should not be enforceable against state agencies by claiming that the IV-D programs are not fully supported by federal funds and are expensive for states to operate.[30] To the contrary, most states actually make money

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[27]PRA § 101(4), 110 Stat. at 2110.

[28]*Nineteenth Annual Report* at 43.

[29] Hence, APWA's claim that the task is impossible, APWA Br. at 5, must be rejected.

[30]*See* Pet. Br. at 2 ("scarce public funding"); APWA Br. at 17 ("State legislatures must make funding decisions among hundreds of agencies and programs competing for the States'

from their IV-D programs. This is because the federal government pays the states not only a share of the costs,[31] but also an incentive payment based on each state's total support collections.[32] In addition, states can keep a share of the support collected on behalf of families receiving Title IV-A benefits.[33] "Over time, net costs of the [IV-D] program to the federal government have risen, as have net savings to states and localities."[34] In 1990, the states netted a combined total of $338 million. *Nineteenth Annual Report* at tbl. 21, p.78. By 1994 their combined net income had jumped 43 percent to $484 million. *Id.* By contrast, the federal government loss due to the IV-D program increased 85 percent from $528 million in 1990 to $976 million in 1994. *Id.* at tbl. 20, p. 77.

An effective state IV-D program can generate both needed support for children and significant revenue for the state. For example, in 1994 Washington State collected support

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limited financial resources"); Illinois Br. at 2 ("enormous financial and programmatic burdens on State IV-D programs"); NDAA Br. at 26 ("delicate balance of economic prioritization currently exists").

[31]The federal government pays 66 percent of the cost of most state IV-D expenditures, 90 percent of costs related to genetic testing, and 80-90 percent of most costs related to automation. PRA § 344 *amending* Social Security Act § 455, 42 U.S.C. § 655 (West Supp. 1996), 110 Stat. at 2236-37, 2256, and 2259.

[32]42 U.S.C. § 658 (West 1991), *amended by* PRA, 110 Stat. at 2231-32.

[33]PRA § 302 *amending* Social Security Act § 457(a)(1), 42 U.S.C. § 657(a)(1) (West 1991), 110 Stat. at 2200.

[34]*CBO Report* at 24

for over 35 percent of its cases. *Id.* at tbls. 32, 34, pp. 89, 91. That same year, Washington netted $30 million from its IV-D program. *Id.* at tbl. 21, p. 78. Thus, Petitioner's opposition to the requirements of IV-D as "unfunded mandates" is groundless. By contrast, however, Arizona, with a caseload size very similar to Washington's, collected support in less than six percent of its cases in 1994. *Id.* at tbls. 32, 34, pp. 89, 91. That same year, Arizona's IV-D program cost the State $5 million, two-thirds higher than its loss of $3 million in 1990.[35] All states have the ability to operate their IV-D programs with a surplus and should not be relieved of any obligation simply because they choose to run underperforming programs.

VI. RECOGNIZING CONGRESS' INTENT TO ALLOW CHILDREN AND FAMILIES TO ENFORCE IV-D PROGRAM REQUIREMENTS WILL NOT INCREASE LITIGATION

Petitioner's dire warnings that a floodgate of litigation would be opened by *Freestone*[36] is meritless as a legal argument and ignores practical constraints on federal litigation.

Not every custodial family that fails to receive child support can seek relief under Section 1983. Section 1983 is only available to those families to whom child support *services* have been denied in violation of explicit federal law. The idea that any large number of custodial parents in need of child

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[35]*Nineteenth Annual Report* at tbl. 21, p. 78. Note, Arizona is one of only eight of the 50 states (16 percent of states) that actually lost money on their IV-D programs. *Id.*

[36]Pet. Br. at 1-2. *See also* Illinois Br. at 2; APWA Br. at 17; NDAA Br. at 26-27.

support could find counsel and initiate Section 1983 actions is patently absurd. If these parents had the resources to litigate, they would be far more likely simply to file their own child support cases in state court. Additionally, Congress itself has made a determination that ensuring effective child support enforcement is more important than protecting the federal court from any incremental burdens. Congress has authorized the Secretary of the U.S. Department of Health & Human Services to permit litigation of ordinary individual actions for support enforcement in the District Courts, without regard to the amount in controversy, when another state fails to undertake the action within a reasonable time.[37]

These practical constraints on federal litigation explain why there has been no increase in Section 1983 litigation in the two federal circuits that have already explicitly recognized the enforceability of Title IV-D in Section 1983 actions.[38] Civil rights actions filed in the First and Eighth Circuits increased no more than those in the other Circuits.[39] Despite the dire

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[37]42 U.S.C. § 660 (West 1991). *See also* Child Support and Recovery Act of 1992, 18 U.S.C. § 228 (West Supp. 1996) (federal crime for nonpayment of support when the noncustodial parent lives in different state from the child.)

[38]*See Albiston v. Maine Comm'r of Human Serv.*, 7 F.3d 258 (1st Cir. 1993); *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1373 (1994); *Jackson v. Rapps*, 947 F.2d 332 (8th Cir. 1991), *cert. denied*, 503 U.S. 960 (1992).

[39]Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics* tbl. C-3 (1994 and 1995); Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* tbl. C-3 (1993); Administrative Office of the United States Courts, *Annual Report of the Director* tbl. C-3 (1991 and 1992). Statistics from individual Circuits do

predictions of Petitioner and her Amici, the federal courts have not been, and will not be, inundated with litigation by parents dissatisfied with IV-D services.

CONCLUSION

Given the ample evidence of Congressional intent to create mandatory, enforceable requirements for state agencies' child support services, and given the critical importance of support payments to the well-being of children, Amici urge this Court to affirm the decision of the Ninth Circuit in this case.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LINDA J. BLESSING,

Petitioner,

—v.—

CATHY FREESTONE, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ARIZONA CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Arizona Civil Liberties Union is one of its statewide affiliates. This case raises issues of special importance to the ACLU because petitioner has called into question both *Maine v. Thiboutot*, 448 U.S. 1 (1980), and *Ex Parte Young*, 209 U.S. 123 (1908), two of the principal vehicles for civil rights litigation in this country. We urge the Court to affirm the decision below, and to reject petitioner's view that state officials cannot be held accountable in federal court for violating federal law.

STATEMENT OF THE CASE

This action for declaratory and injunctive relief was brought on behalf of custodial parents and their children. It challenges the failure of Arizona officials to comply with the mandates of Title IV-D of the Social Security Act, 42 U.S.C. §§651-69. Pursuant to Title IV-D, the federal government provides Arizona with funding for child support programs. In return, Arizona is obligated to provide certain child support services designed, *inter alia*, to recover child support payments from delinquent parents. As described by the lower court, the federally mandated services include a system for the "establishment of paternity, enforcement of support orders, and parent locator services." *Freestone v. Cowan*, 68 F.3d 1141, 1143 (9th Cir. 1995).

The complaint filed by respondents in this case alleges that Arizona officials were not in fact providing the services

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

that federal law requires. Specifically, the complaint sets forth the individual stories of several mothers who, despite repeated attempts, could not obtain the mandated Title IV-D services from Arizona officials. It also recites statistics to show that the particular problems identified in the complaint are serious and widespread.

Petitioner moved to dismiss on the grounds that the parents and children who initiated this suit have no private right of action to enforce the federal mandates. The district court agreed with petitioner, treating it as a motion for summary judgment. The court of appeals reversed, holding that Congress did not intend to foreclose private enforcement of Title IV-D.

In this Court, petitioner presses three arguments: (1) there is no private right of action under the traditional standards for resolving that issue, most recently articulated in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 503 U.S. 347 (1992); (2) this Court should reverse or sharply limit the holding in *Maine v. Thiboutot*, 448 U.S. 1, that 42 U.S.C. §1983 provides a - private right of action to enforce federal statutory rights as well as federal constitutional guarantees; and (3) this Court should reverse or sharply limit the holding in *Ex Parte Young*, 209 U.S. 123, that the Eleventh Amendment does not prohibit federal courts from requiring state officials to comply with federal law.

Amici agree with respondents that a private right of action exists to enforce Title IV-D under the standards of *Wilder* and *Suter*. However, this brief focuses on petitioner's challenge to *Maine v. Thiboutot* and *Ex Parte Young*. If successful, that challenge would dramatically alter legal structure established by this Court over the last century to enforce rights created by federal law.

SUMMARY OF ARGUMENT

Although the word "federalism" does not appear in the Constitution, there is no doubt that it is crucial to the American constitutional system. Federalism refers to the division of powers between the national and the state governments. Under our constitutional system, each has its own sphere of authority and responsibility. Properly understood, therefore, federalism is as much about preserving the power and responsibility of the federal government as it is about preserving the power and responsibility of the states.

Petitioner emphasizes one aspect of federalism: safeguarding state governments from federal encroachments. The Tenth Amendment's limits on Congress and the Eleventh Amendment's restrictions on the federal judicial power reflect this constitutional concern. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. __, 116 S.Ct. 1114 (1996); *New York v. United States*, 505 U.S. 144 (1992).

Petitioner, however, ignores the other aspect of federalism: protecting the interests of the national government. The single most important constitutional provision concerning federalism is found in Article VI: "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." In short, federalism is also, in major part, about ensuring the supremacy of federal law. *Sterling v. Constantin*, 287 U.S. 378, 397 (1932); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. __, __, 115 S.Ct. 1842, 1872 (1995)(Kennedy, J., concurring)(emphasizing that federalism is about protecting both state sovereignty and the interests of the national government).

There is no doubt that §1983 was meant to empower the federal courts to review state and local actions to ensure their compliance with federal law. During the debates pre-

ceding enactment of §1983, one Congressman and Senator after another so declared. Cong. Globe, 42d Cong., 1st Sess. 321 (1871)(remarks of Rep. Stoughton); *see also id.* at 374-76 (remarks of Rep. Lowe); *id.* at 459 (remarks of Rep. Coburn); *id.* at 609 (remarks of Sen. Pool); *id.* at 687 (remarks of Sen. Surz); *id.* at 691 (remarks of Sen. Edmunds). Likewise, this Court has often recognized the critical importance of federal court review in assuring state compliance with the Constitution and laws of the United States. *See, e.g., Mitchum v. Foster*, 407 U.S. 225 (1972).

Contrary to petitioner's argument in this case, *Ex Parte Young* and *Maine v. Thiboutot* are not at war with federalism, they are essential to its preservation. It is through suits against state officers pursuant to *Ex Parte Young* that state compliance with federal law is achieved. As the Court noted in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 105 (1984)(*Pennhurst II*): "Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights." *Id.* at 105. Or, as the Court explained in *Green v. Mansour*, 474 U.S. 64, 68 (1986): "[T]he availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the supremacy clause."

Likewise, it is through *Maine v. Thiboutot* that suits can be brought, pursuant to §1983, to ensure state and local compliance with federal statutes. Thus, after again reviewing the legislative history of §1983 in *Maine v. Thiboutot*, the Court concluded that "there can be no doubt that [§1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 448 U.S. at 5, quoting *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 700-701 (1978).

Petitioner's brief is breathtaking in its willingness to disregard this Court's well-established jurisprudence and impose new restrictions on federal court jurisdiction. For all practical purposes, petitioner seeks to overrule *Ex Parte Young* by contending that the Eleventh Amendment bars all suits, including suits for injunctive and declaratory relief, where it is the state that is the real party in interest. Pet.Br. at 25. In *Young* itself, the State of Minnesota was the real party in interest: the injunction against Edward Young was to prevent the enforcement of a state statute. Indeed, in virtually every case, suits pursuant to *Ex Parte Young* are brought to enjoin enforcement of a state law or policy; ultimately, the state is the real party in interest in all these cases. In addition, petitioner expressly calls for this Court to overrule its decision in *Maine v. Thiboutot*, 448 U.S. 1. Pet.Br. at 30-48.

The radical changes urged by petitioner would dramatically upset the allocation of power between the national and state governments by allowing states to violate federal law with impunity. Instead of promoting federalism, the changes urged by petitioner would do exactly the opposite and would abandon the framers' plan for a national government supreme over the states.

ARGUMENT

I. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO REVERSE OR SHARPLY LIMIT THE HOLDING OF *MAINE v. THIBOUTOT*

A. *Maine v. Thiboutot* Was Correctly Decided

Petitioner argues that this Court should reverse the holding of *Maine v. Thiboutot* and hold instead that §1983 either provides no private right of action to enforce federal statutory guarantees, or that it provides a private right of action only to enforce constitutional provisions and statutes that provide for the enforcement of "equal or civil rights." Be-

cause *Thiboutot* was correctly decided, petitioner's argument should be rejected.

Section 1983 provides a cause of action for the ". . . deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." In the 1960s, this Court was increasingly presented with suits alleging violations of "laws" independent of or in addition to constitutional violations. By 1979, the Court had decided many such cases, as all Justices then on the Court acknowledged. *See Thiboutot*, 448 U.S. 1, 6, and at 26, 30-33 (Powell, J., dissenting); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 644-46 (1979)(Powell, J., concurring), 660-63 (White, J., concurring); and 673-74 (Stewart, J., dissenting).

In some cases, the Court simply reached the merits without discussing the applicability of §1983. In other cases, the Court supported its holding by noting that §1983 provided a cause of action for violations of federal statutes as well as constitutional provisions. For example, in *Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966), the Court said that state officials could be held liable under §1983 "not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." In *Edelman v. Jordan*, 415 U.S. 651, 675 (1974), then-Justice Rehnquist, writing for the Court, said that "suits in federal court under §1983 are proper to secure compliance with the provisions of the Social Security Act," citing *Rosado v. Wyman*, 397 U.S. 397 (1970). *See also Quern v. Jordan*, 440 U.S. 332, 337 (1979). In *Owen v. City of Independence*, 445 U.S. 622, 649 (1980), the Court said that the question under §1983 was whether the defendants had conformed to the Constitution "and statutes."

This view was relatively uncontroversial until 1979, when a debate began among the Justices of this Court on the

scope of the "and laws" portion of §1983. Relying primarily on legislative history from the nineteenth century, three Justices in *Chapman*, led by Justice Powell, argued that "and laws" meant "and equal or civil rights laws." 441 U.S. at 623. In response, four Justices argued that the phrase "and laws" contained no such qualifiers. *Id.* at 646, 672.

The debate that surfaced in *Chapman* was settled in *Thiboutot*, only one year later. By a vote of 6-3, the Court held that the phrase "and laws" in §1983 meant exactly what it said and was not limited to "equal or civil rights laws." The *Thiboutot* Court relied upon: (1) the plain language of the Act, (2) its prior decisions, and (3) the legislative history of §1983. Because in each case the Court's view was correct, petitioner's challenge to *Thiboutot* should be rejected.

1. Plain Language Of §1983

First and foremost, the plain language of §1983 contains no limitations. The statute has no modifying phrase that can fairly be read to limit either the constitutional[2] or statutory provisions for which a cause of action is created.

The phrase "Constitution and laws" was hardly unfamiliar to Congress. Its first appearances are in Article III, §2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .") and the Supremacy Clause ("This Constitution and the Laws of the United States, which shall be

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[2] It is not clear whether petitioner would have the Court also limit the constitutional rights that can be enforced pursuant to §1983 and thereby reverse *Monroe v. Pape*, 365 U.S. 167 (1961), and *United States v. Classic*, 313 U.S. 299 (1941). At one point, petitioner appears to suggest precisely that, thus further reinforcing the truly radical scope of petitioner's argument. Pet.Br. at 36 n.19.

made in Pursuance thereof. . . shall be the supreme law of the Land . . . ."), Article VI, cl. 2. Alexander Hamilton used the phrase in THE FEDERALIST PAPERS. Federalist Nos. 78 and 80 (539 J. Cooke ed. 1961). In 1801, Congress enacted a short-lived predecessor to the federal question jurisdictional statute which, like its current version, used the phrase. Act of Feb. 13, 1801, §11, 2 Stat. 89, 92; *repealed by* Act of March 8, 1802, §1, 2 Stat. 132. The phrase also appears in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391-92 (1821).

Based on this history, it is reasonable to assume that Congress knew what it was doing when it referred, in §1983, to rights secured by the "Constitution and laws" of the United States, and that it used those terms in their ordinary sense. Certainly, that was this Court's conclusion in numerous cases culminating in *Thiboutot*, but not limited to it. Even if the text were less clear, such a consistent interpretation of the congressional language is entitled to respect.[3]

2. Legislative History Of §1983

Section 1983 has its origins in §1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, which provided that African-American citizens would have the "same right" as white citizens "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property." Section 3 of that Act gave the federal courts jurisdiction to enforce those rights.

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[3] "[O]ur acceptance of the plain terms of [§1983] and analogous criminal proscriptions has been consistent, and for over a century Congress has not acted to rectify any purported error in our construction of these provisions." *Chapman*, 441 U.S. at 658-59 (White, J. concurring).

In 1871, Congress expanded the Act by creating a private right of action that was not limited to the enumerated rights from the 1866 law; instead, it provided for suit concerning "any rights, privileges, or immunities secured by the Constitution of the United States." 17 Stat. 13.[4] In 1874, Congress changed the language again to its current version, which now protects "any rights . . . secured by the Constitution and laws . . ." Rev.Stat. §1979.[5]

Congress also created two jurisdictional statutes in 1874. The district court jurisdictional statute, Rev.Stat. §563(13), was consistent with §1983 and provided jurisdiction for violations of laws as well as the Constitution. The circuit court jurisdictional statute provided jurisdiction only for "any law providing for equal rights." Rev.Stat. §629 (16).[6] In 1911, Congress merged the two jurisdictional statutes into the present §1343(3), providing jurisdiction for any "Act of Congress providing for equal rights . . ." Judicial Code of 1911, ch. 231, §24, 36 Stat. 1087, 1091.

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[4] Section 16 of the 1870 Act, governing criminal penalties, expanded previous law and made it a crime to conspire to deny any right secured by the Constitution "or laws." Ch. 114, 16 Stat. 140; *Chapman*, 441 U.S. at 651 (White, J., concurring). *See also United States v. Price*, 383 U.S. 787 (1966); *United States v. Classic*, 313 U.S. 299. That language, in what is now 18 U.S.C. §§241, 242, has been interpreted consistently with the identical language in §1983. Petitioner does not indicate if she believes a modifier should also be implied in §§241 and 242, thus overruling *Price*, *Classic*, and similar cases, as well as *Thiboutot*. *See Chapman*, 441 U.S. at 662-63 (White, J. concurring).

[5] Because they are identical for purposes of this case, Rev.Stat. §1979 will be referred to by its present designation, §1983.

[6] The criminal statutes continued to prohibit violations of rights under the "Constitution or laws." *Chapman*, 441 U.S. at 661 (White, J. concurring).

Petitioner's argument that the phrase "and laws" in §1983 should be limited to "laws providing for equal rights" rests on two basic premises, both of which were also advocated by Justice Powell in *Chapman* but rejected by the full Court in *Thiboutot*. First, petitioner argues that the revision of the statutes in 1874 was supposed to be technical, not substantive. *Chapman*, 441 U.S. at 625; *Thiboutot*, 448 U.S. at 16-18. Second, petitioner contends that §1983, and its two jurisdictional counterparts, Rev.Stat. §563(13)(district court jurisdiction without limitation) and §629(16)(circuit court jurisdiction limited to "equal rights"),[7] should be interpreted to have the same meaning despite their different language. Furthermore, petitioner argues that the meaning that should be ascribed to all three statutes is the limited one of §629(16) rather than the more expansive one found in the other two statutes and the corresponding criminal statutes. *See also Chapman*, 441 U.S. at 635 (Powell, J.). Both premises of petitioner's argument are flawed.

Specifically, there is ample evidence in the legislative history that Congress recognized it was expanding §1983 when it added the phrase "and laws" in 1874. *Chapman*, 441 U.S. at 664, n.40 (White, J. concurring). Representative Lawrence's comment that §1983 would be applied more broadly than its predecessor in a "few cases," *id.*, both supports the notion that the language change was intentional and reflects the fact that, in 1874, there were only a "few" statutory rights that could be protected by §1983. *See* Rev. Stats. §§2259, 2289, 2319, 2320, 3194, 3199. In addition, Congress rejected a proposal offered by Representative Willard which would have required that any provision of the Revised Statutes be interpreted identically to earlier, differ-

[7] Hereinafter, §§563(13) and 629(16), unless explicitly so cited, will be referred to by the section given them after merger, §1343.

ently worded provisions. 2 Cong.Rec. 648 (1874); *see also Hamilton v. Rathbone*, 175 U.S. 414 (1899); *Vietor v. Arthur*, 104 U.S. 498, 500 (1881); *McDonald v. Hovey*, 110 U.S. 619, 629 (1883); *Deffeback v. Hawke*, 115 U.S. 392, 402 (1885); Endlich, A COMMENTARY ON THE INTERPRETATION OF STATUTES 65 (1888).[8]

Whether one characterizes the 1874 change as "technical" or not, the language of §1983 is clear and unambiguous, especially when compared to the narrower language used by Congress when it defined the jurisdiction of the circuit courts. Significantly, moreover, the first draft of §1983 contained the narrower language of the 1871 Act; it was changed for the final draft. Title LXXIII, Chap. VII, §190 (Draft of 1872). Under analogous circumstances, this Court has repeatedly held that the Revised Statutes of 1874 must be seen as having changed the law where the plain language so dictates. *See United States v. Bowen*, 100 U.S. 508, 513 (1880)("when the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision . . ."); *Hamilton v. Rathbone*, 175 U.S. at 419-21 ("prior acts may be resorted to, to *solve*, but not to *create* an ambiguity")(emphasis in original); *Continental Casualty Co. v. United States*, 314 U.S. 527, 530 (1942).

In addition, after 1874, Congress recognized that it had inadvertently made some 253 substantive errors. Those

[8] The 1874 Revisions explicitly repealed all prior statutes. Rev.Stat. §5596; 2 Cong.Rec. 2713 (1874). *See also* 7 Cong.Rec. 1137 (1878)(in interpreting the Revised Statutes of 1874, "the courts cannot look back to the original and be governed by that, because the original act has been repealed . . .")(Sen. Christiancy). When a later significant revision of federal law was proposed, Congress adopted the opposite approach and refused to "have it absolutely replace all the laws of the United States as was done by the Revised Statutes in 1874." 67 Cong.Rec. 12074 (1926)(Rep. Fitzgerald).

were corrected in 1877 and again in 1878. 18 Stat. 1433-36; 19 Stat. 240 (1877). Section 1983 was not among those corrected, though other provisions of both of the jurisdictional statutes were modified. *See* R. Dwan and E. Feidler, "The Federal Statutes: Their History and Use," 22 Minn.L. Rev. 1008, 1014 (1938); M. Price and H. Bitner, EFFECTIVE LEGAL RESEARCH 29 (3d ed. 1969); Comment, "Section 1983 and the Private Enforcement of Federal Statutes: A New Frontier for the Civil War Legislation," 18 Willamette L.Rev. 433 (1982).

Petitioner's second premise -- that §1983 and §1343 must be read identically -- is equally flawed. There is simply no reason to suggest that §§1983 and 1343(3) need be read identically. *See generally Chapman*, 441 U.S. at 660-63 (White, J., concurring). It is entirely logical, as this Court ultimately held, to assume that Congress chose to limit the availability of §1343 to actions seeking to enforce equal rights laws while providing jurisdiction over other statutory §1983 actions only where the requisite amount in controversy under §1331 was met. Such a choice presumably would have been based either on the theory that suits claiming infringements of the equal rights guarantees are less amenable to pecuniary valuation than other actions, *see Hague v. CIO*, 307 U.S. 496, 529 (1939), or on the theory that suits claiming such violations should be heard regardless of the amount in controversy.[9]

3. Petitioner's Proposed Alternatives To *Thiboutot*

Petitioner suggests two "interpretations" of §1983 to replace the holding in *Thiboutot*. First, she suggests that

[9] Since the 1908 elimination of a jurisdictional amount requirement in federal question cases, this debate is irrelevant. 28 U.S.C. §1331. *See* Pub.L.No. 96-486, §2(a), 94 Stat. 2369 (1980).

§1983 should be read to create a private right of action only where another statute creates a private right of action. Pet. Br. at III.A. This would, of course, make §1983 entirely superfluous.[10] Undeterred, petitioner argues that making §1983 superfluous would be a harmless act because an implied private right of action exists to enforce constitutional rights,[11] and because other statutes would create private rights of action where Congress intended they exist. Whether this Court would be causing harm or not by essentially repealing §1983 is irrelevant. As petitioner admits, the key question is congressional intent and it is elemental that this Court should not lightly presume that Congress intended to pass totally meaningless statutes. Indeed, in light of the history of §1983, for this Court to find that Congress did not intend it to have any meaning would be a most remarkable holding.

Second, petitioner suggests that §1983 be limited to creating a private cause of action to enforce "equal or civil rights." Pet.Br. at III.B. Primarily for the reasons stated above, this argument is unpersuasive. Any lingering doubt was removed when this Court recently reaffirmed its holding in *Thiboutot* rejecting that argument. Specifically, in *Dennis v. Higgins*, 498 U.S. 439 (1991), the Court stated that "[a]

[10] She also suggests the need to adhere to the plain statement rule. Pet. Br. at III.A. Of course, in *Thiboutot*, this Court held that §1983 is a plain statement of Congress' intent.

[11] In support, petitioner cites *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a case establishing a private right of action to sue federal officials, not state officials, for violation of constitutional rights. This Court has never explicitly held that an implied right of action exists to sue state officials for violation of constitutional rights. It has never had to -- §1983 provides that cause of action. It is only by seeking to render §1983 meaningless that petitioner must ask this Court to reach the issue of an implied cause of action.

broad construction of §1983 is compelled by the statutory language, which speaks of deprivations of 'any rights, privileges, or immunities secured by the Constitution and laws.' Accordingly, we have 'repeatedly held that coverage of [§ 1983] must be broadly construed.'" *Id.* at 443. *Dennis* further noted:

> the Court has never restricted the section's scope to the effectuation of [equal rights]. Rather we have given effect to its broad language, recognizing that §1983 "provides a remedy to be broadly construed, against all forms of official violation of federally protected rights. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 700-701 (1978). Thus we have refused to limit the phrase 'and laws' in §1983 to civil rights or equal protection laws.

Id. at 445; *Livadas v. Bradshaw*, 512 U.S. __, __, 114 S.Ct. 2068, 2083 (1994). To accept petitioner's argument would be to reject the statements in *Dennis*. Alternatively, it would require that the Court hold that there was an implied limitation on the "and laws" portion of §1983 that did not exist in the "Constitution" portion.

Petitioner suggests one other rationale for adopting this interpretation.[12] It would, she argues, "bring[] §1983 into

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[12] Petitioner also emphasizes that §1983 does not create a cause of action unless there is a "right . . . secured." She argues that this somehow requires the plain statement of a cause of action in the underlying substantive statute. Instead, the "right . . . secured" language connotes that the right is mandatory. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)(*Pennhurst I*). No section of the Constitution has an express right of action, yet many sections have been held by the Court to "secure" rights that are enforceable through §1983. *See Chap-*
(continued...)

harmony with the Court's most recent interpretation of the Eleventh Amendment." Pet.Br. at 43. Of course, §1983 does not abrogate the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. at 341. Thus, restricting §1983 is not necessary to protect the values of the Eleventh Amendment. Instead, this argument is really a thinly disguised second attempt to limit or reverse *Ex Parte Young* and, for the reasons stated in Point II of this brief, should be rejected.

B. The Standards Required For Violating The Principles Of *Stare Decisis* Have Not Been Met

"The Court has said often and with great emphasis that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), quoting *Welch v. Texas Dep't of Highways and Public Transportation*, 483 U.S. 468, 494 (1987). It has also said that "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 ("'the evenhanded predictable, and consistent development of legal principles . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process' counsel strongly against reconsideration of our precedent." *See also Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

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[12] (...continued)
man, 441 U.S. at 613 n.29 (referring to rights "protected by the Constitution and hence secured by it")(citations omitted). Thus, to adopt petitioner's argument, the Court would either have to hold that "secured" means something different when it refers to the Constitution than when it refers to laws, or that the Constitution does not "secure" any rights and §1983 is therefore unavailable to enforce constitutional rights.

In asking this Court to overrule *Maine v. Thiboutot*, petitioner is asking this Court to overrule a question of statutory interpretation. As this Court has frequently observed, however, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at 172-73. *See also Seminole Tribe*, 116 S.Ct. at 1127. Congressional intent is, therefore, key.

Even prior to the *Thiboutot* decision, Congress had unmistakably expressed its view that §1983 provided a broad right to enforce federal statutes. During the passage of 42 U.S.C. §1988, Congress repeatedly noted its approval of the view that §1983 provided for a private right of action to enforce statutes as well as constitutional rights. For example, the Senate report indicated that the bill would result in the award of fees for "redressing violations of the Federal Constitution *or laws* by officials . . ." S.Rep.No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* 5 U.S. Code Cong. and Admin. News 5908, 5911 (1976)(emphasis added). Sponsors of the bill agreed. "Under applicable judicial decisions, Section 1983 authorizes suits against State and local officials based on Federal *statutory as well as* constitutional rights." 122 Cong.Rec. 35122 (1976)(Rep. Drinan)(emphasis added). "This legislation is intended to cover cases based on both constitutional *and statutory* rights . . ." 122 Cong.Rec. 33315 (1976)(Sen. Abourezk)(emphasis added); 122 Cong. Rec. 33314 (1976)(Sen. Kennedy). And, during the debate over §1983, congressional supporters approvingly cited cases based on non-equal rights statutes, such as the Social Security Act, as well as statutes providing for equal or civil rights. *Id.*; *Thiboutot*, 448 U.S. at 9-10; Note, "The Application of Section 1983 to the Violation of Federal Statutory Rights: *Maine v. Thiboutot*," 30 De Paul L.Rev. 651 (1981).

Since *Thiboutot*, Congress has reaffirmed its intent that §1983 be interpreted to permit a private right of action to enforce federal statutes in several ways. First, Congress rejected bills introduced in 1981, 1985, and 1987, that would have limited §1983 precisely as urged by petitioner.[13] Indeed, in *Thiboutot*, this Court invited Congress to change the law if it thought the Court's interpretation of congressional intent in error. 448 U.S. at 8. Congress' express refusal to do so is surely some indication of Congress' agreement with the interpretation in *Thiboutot*.

Second, in 42 U.S.C. §1320a-2, passed in response to the decision in *Suter v. Artist M.*, 503 U.S. 347, Congress indicated its view that a private right of action did and should exist in Social Security Act cases. In that statute, Congress sought to reestablish private right of action law as it existed prior to *Suter*, law that included the holding in *Thiboutot*. Whatever the precise meaning of the post-*Suter* statute,[14] it represents a clear re-endorsement of *Thiboutot*. Thus, far from viewing *Thiboutot* as error, Congress has indicated agreement with its holding.

Another principal factor relevant to *stare decisis* is whether the decision has proved unworkable or, in the alternative, has been relied upon.[15] Not only has *Thiboutot* not

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[13] S.584, 97th Cong., 1st Sess §1 (1981); S.436, 99th Cong. 1st Sess. §1 (1985); S.325, 100th Cong., 1st Sess. §1 (1987). *See also Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976).

[14] At the very least, §1320a-2 was clearly intended to reverse any implication in *Suter* that the only right created by the Social Security Act was the right to a state plan, and that persons affected could never sue to require that the plan be implemented.

[15] Petitioner's argument that no one has relied upon the Court's decision in *Thiboutot* is also flawed. There have been hundreds, if not thousands, of decisions both before and after 1980 applying §1983 to create a cause of action for violations of federal statutes.

proven unworkable, but a decision reversing it would cast doubt on dozens of this Court's own cases,[16] and hundreds of lower court cases, a situation that would create massive (and unnecessary) chaos.

In short, petitioner's attack on *Maine v. Thiboutot* would promote instability in the law. The doctrine of *stare decisis* is designed to have precisely the opposite effect.

II. THE COURT SHOULD REJECT PETITIONER'S INVITATION TO REVERSE OR SHARPLY LIMIT THE HOLDING OF *EX PARTE YOUNG*

Because this suit alleges that petitioner is violating federal law in her capacity as Director of the Arizona Department of Economic Security, she is stripped of any Eleventh Amendment immunity under *Ex Parte Young*, 209 U.S. 123, and the federal courts have jurisdiction to provide declaratory and injunctive relief.

Edelman v. Jordan, 415 U.S. 651, is directly on point. *Edelman* was a class action seeking injunctive and declaratory relief against the Director of the Illinois Department of Public Aid for allegedly violating federal mandates that applied to the program of Aid to the Aged, Blind, and Disabled. In other words, like this case, *Edelman* involved a

[16] Following the decision in *Thiboutot*, this Court has repeatedly used its holding to acknowledge that §1983 creates a private right of action to enforce federal law. *Livadas v. Bradshaw*, 114 S.Ct. 2068; *Suter v. Artist M.*, 503 U.S. 347; *Dennis v. Higgins*, 498 U.S. 439; *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498; *Golden State Transit v. Los Angeles*, 493 U.S. 103 (1989); *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Cuyler v. Adams*, 449 U.S. 433 (1981). *See also Schweiker v. Chilicky*, 487 U.S. 412 (1988).

class action suit against the state official responsible for complying with federal standards in a federally funded program. This Court, in an opinion by then-Justice Rehnquist, carefully distinguished between retroactive relief that would run against the state treasury and thus was barred by the Eleventh Amendment, and prospective relief against the state official that had been allowed pursuant to *Ex Parte Young*. The Court declared:

> *Ex parte Young* was a watershed case in which this Court held that the Eleventh Amendment did not bar an action in the federal courts seeking to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment of the United States Constitution. This holding has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect. But the relief awarded in *Ex parte Young* was prospective only; the Attorney General was required to conform his future conduct of that office to the requirement of the Fourteenth Amendment.

415 U.S. at 664.

As in *Edelman*, respondents here are seeking only prospective relief to ensure that the Director of the Arizona Department of Economic Security conforms the future conduct of her office to the requirements of federal law. *Edelman* expressly held that suits for such prospective relief are not barred by the Eleventh Amendment, even if compliance with the federal court order would impose costs on the state.

Petitioner offers two reasons why the Eleventh Amendment bars this suit: the injunctive relief would run against the state as the real party in interest, and the case fits within

the exception to *Ex Parte Young* recognized in *Seminole Tribe v. Florida*, 116 S.Ct. 1114. As discussed below, neither of these claims has merit. Indeed, if either were followed, the ability to ensure state compliance with federal law would be greatly diminished, if not eviscerated, thus undermining one of the basic principle of federalism.

A. Injunctive And Declaratory Relief Against State Officers Is Not Barred, Even If The State Government Is The "Real Party In Interest"

Petitioner claims that "the Eleventh Amendment bars a suit against State officers when the 'state is the real, substantial party in interest' and the officer is being sued merely as a representative of the State." Pet.Br. at 25. Petitioner cites *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 463-64 (1945), as authority for this proposition. *Ford Motor Co.*, however, involved a claim for money damages, not injunctive or declaratory relief. *Ford Motor Co.* was a federal court suit brought by a taxpayer for a refund of state taxes that had been paid under protest. *Ford Motor Co.* held only that suits for retroactive money damages against state officers are barred when the state is the real party in interest and the state treasury will be paying the sum. The Court said: "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* at 464. The case did not involve a claim for prospective injunctive or declaratory relief.

In fact, no Supreme Court case ever has held that injunctive or declaratory relief against state officers is barred because the state is the real party in interest. Quite the contrary, this Court frequently has recognized that suits against

officers are allowed precisely so that there is a mechanism to ensure state compliance with federal law. In *Perez v. Ledesma*, 401 U.S. 82 (1971), this Court explained:

> *Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution . . . . [The enactment of §1983 and §1331, creating general federal question jurisdiction], together, after 1908, with the decision in *Ex parte Young*, established the modern framework for federal protection of constitutional rights from state interference. That framework has been strengthened and expanded by subsequent acts of Congress and subsequent decisions of this Court.

Id. at 106-07 (Brennan, J., concurring in part and dissenting in part).

Suits pursuant to *Ex Parte Young* clearly are not barred, as petitioner contends, because the injunctive or declaratory relief is ultimately directed against the state government. In *Ex Parte Young* itself, the suit was brought against the Attorney General of Minnesota to enjoin the enforcement of an allegedly unconstitutional state law. The State, of course, was the "real party in interest." This Court has expressly recognized that reality, but nonetheless concluded that such prospective relief is essential to ensure the supremacy of federal law. For example, in *Pennhurst II*, this Court said that "the injunction in *Young* was justified, *notwithstanding the obvious impact on the State itself* . . . ." 465 U.S. at 104 (emphasis added). As the Court observed, "the *Young* doctrine has been accepted as necessary to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States,'" *id.* at 105, quoting *Ex Parte Young*, 209 U.S. at 160.

Indeed, every time a state officer is sued pursuant to *Ex Parte Young* to enjoin the enforcement of an unconstitutional state law or regulation, the state is the real party in interest. Petitioner's position would bar all such suits and thus effectively overrule *Ex Parte Young*. There would be no way to bring suit in federal court to ensure state compliance with federal law and to uphold the supremacy of the federal government over the states. The state itself, of course, could not be sued in federal court because of the Eleventh Amendment. Petitioner's position also would bar suits against the officers. The doors of the federal courts would be closed, except for the relatively remote chance of Supreme Court review of a state court decision.

This Court often has rejected exactly that possibility and has emphasized the importance of federal courts being available to hear suits against state officers to ensure compliance with federal law. The Court has said that "the doctrine of *Ex Parte Young* seems indispensable to the establishment of constitutional government and the rule of law." *Perez v. Ledesma*, 401 U.S. at 110 (Brennan, J., concurring in part and dissenting in part), quoting C. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS 186 (2d ed. 1970). Likewise, Justice Souter recently explained: "*Young* provided, as it does today, a sensible way to reconcile the Court's expansive view of immunity expressed in *Hans* with the principles embodied in the Supremacy Clause and Article III .... [T]he rule we speak of under the name of *Young* is so far inherent in the jurisdictional limitation imposed by sovereign immunity as to have been recognized since the Middle Ages." *Seminole Tribe v. Florida*, 116 S.Ct. at 1178-79 (Souter, J., dissenting).

Justice Souter explained the crucial significance of suits pursuant to *Ex Parte Young* in upholding the supremacy of federal law when he stated:

> The decision in *Ex parte Young*, and the historic doctrine it embodies, thus plays a foundational role in American constitutionalism, and while the doctrine is sometimes called a "fiction," the long history of its felt necessity shows it to be something much more estimable .... A rule of such lineage, engendered by such necessity, should not be easily displaced, if indeed it is displaceable at all, for it marks the frontier of the enforceability of federal law against sometimes competing state policies.

Seminole Tribe, 116 S.Ct. at 1180.

Petitioner's position would completely displace *Ex Parte Young*. No mechanism would exist for federal courts to review state laws, no matter how egregious they are in violating federal law and even the Constitution. By petitioner's theory, all federal court review of the constitutionality of state laws, even when accomplished pursuant to *Ex Parte Young*, is barred because the state is the real party in interest. Petitioner simply fails to recognize that ensuring the supremacy of federal law is an essential aspect of federalism and that gutting *Ex Parte Young* in the manner that petitioner advocates would undermine a cornerstone of American government.[17]

B. *Seminole Tribe v. Florida* Creates A Narrow Exception To *Ex Parte Young*

Petitioner offers an alternative argument as to why this case is barred by the Eleventh Amendment: "[t]he principles in *Seminole Tribe* bar a §1983 action in this case." Pet.

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[17] Of course, *stare decisis* strongly supports continued adherence to *Young*, as well as *Thiboutot*. *See Planned Parenthood v. Casey*, 505 U.S. 833.

Br. at 26. In *Seminole Tribe*, this Court declared that "[w]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a Court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." 116 S.Ct. at 1132.

At the outset, it should be noted that *Seminole Tribe* is clearly distinguishable from this case. *Seminole Tribe* did not involve, as does this action, a suit brought pursuant to §1983. Rather, the suit in *Seminole Tribe* was brought under the Indian Gaming Regulatory Act, which expressly allowed suits against states to be brought in federal court. This, of course, was the provision declared unconstitutional in the first part of the majority's opinion in *Seminole Tribe*. Thus, *Seminole Tribe* did not present the situation posed in this case: a suit under the express language of §1983 authorizing suits against state officers to halt violations of "laws" of the United States. Indeed, this is evidenced by the fact that the Court nowhere mentions §1983 or its availability to enforce federal statutes, but instead cites *Schweiker v. Chilicky*, 487 U.S. 412, which concerns suits brought directly under the Constitution.

Even prior to *Seminole Tribe*, this Court had recognized that §1983 suits to enforce a federal statute are precluded when there are "comprehensive enforcement mechanisms" in the law demonstrating "congressional intent to preclude the remedy of suits under §1983." *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. at 20. A fair reading of *Seminole Tribe*, therefore, is that the limitation on §1983 suits announced in *Middlesex County* now also applies to suits against state officers brought pursuant to other federal statutes.

Not surprisingly, this is exactly how lower federal courts have interpreted the exception to *Ex Parte Young*

discussed in *Seminole Tribe*. The Seventh Circuit, for example, cited *Seminole Tribe* and *Middlesex County* as establishing the same proposition, that "[w]hen Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they embody are not to be generally circumvented by extending a more generally worded statute over the subject of the more specific one." *McDonnell v. Cisneros*, 84 F.3d 256, 261 (7th Cir. 1996)

This interpretation of *Seminole Tribe* is consistent, as well, with other efforts by this Court to reconcile the Eleventh Amendment and §1983. For example, in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Court held that state governments are not persons and may not sued under §1983 in state courts. Although the Eleventh Amendment has no application in state court litigation, the Court interpreted §1983 to be in accord with the principles of the Eleventh Amendment.

Similarly, the holding of *Seminole Tribe* that *Ex Parte Young* does not permit suits against state officers under a federal law that embodies a comprehensive enforcement mechanism, is best understood as an effort to bring Eleventh Amendment law into line with the §1983 rule announced in *Middlesex County*. That holding, however, does not doom this suit. To the contrary, it is perfectly clear under *Middlesex County* that the suit against petitioner would be permissible. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, this Court held that a comprehensive enforcement mechanism should be deemed to exist only if there is an "express provision or other specific evidence from the statute itself that Congress intended to foreclose" litigation. *Id.* at 423. *Wright* further ruled that administrative remedies alone do not preclude §1983 litigation absent a more specific congressional intent to prohibit §1983 suits. Here, the only mechanisms to enforce Title

IV-D are administrative and there is no specific congressional intent to bar §1983 litigation.

Thus, *Seminole Tribe* did no more than to extend the *Middlesex County* exception from §1983 suits to suits against state officers brought under other statutory provisions. In other words, when state officers are sued pursuant to *Ex Parte Young*, the *Middlesex County* exception means that such suits are barred if there is a comprehensive enforcement mechanism as defined in *Middlesex County* and *Wright v. Roanoke Redevelopment and Housing Authority*. Because there is no comprehensive scheme in this case, *Ex Parte Young* remains the only avenue available to respondents to secure compliance with federal law. Nothing in *Seminole Tribe* supports petitioner's claim that this sole avenue should now be closed. The Court should emphatically reject petitioner's invitation to turn civil rights enforcement back one hundred years.

CONCLUSION

For the reasons stated above, the Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

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OCTOBER TERM, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

v.

CATHY FREESTONE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER NOW LEGAL DEFENSE AND EDUCATION FUND WOMEN'S LEGAL DEFENSE FUND

(Additional *Amici* Listed Inside Cover)

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INTEREST OF THE *AMICI*

Amici curiae are organizations strongly committed to ensuring that the fundamental human needs of low-income persons, especially women and children, are met. Each of the *amici* has a strong interest in achieving state compliance with the requirements of the federal-state child support enforcement program contained in Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.* Descriptions of the individual organizations are set forth in the attached appendix.

Petitioner and respondent have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.[1]

SUMMARY OF ARGUMENT

Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.*, is a cooperative federal-state program, enacted pursuant to Congress' spending power, in which the federal government provides significant funds to participating States for use in establishing paternity, and establishing, enforcing, and modifying child support orders. The legislative history of Title IV-D discussed *infra* is crucially significant to the question whether Title IV-D creates rights that are enforceable against the States under 42 U.S.C. § 1983.

The goals behind Title IV-D have enjoyed near-universal support over the last twenty years, namely: to assure that the States do more to ensure that paternity is established for children born out of wedlock and that child support is secured for children deprived of parental support. Congress has demonstrated its strong commitment to these goals by acting time after time to strengthen Title IV-D. Since Congress first mandated that States provide child support and paternity establishment services in return for federal funds, Congress has monitored the States' actions, and when Congress has found that the States were not doing enough, it has passed new

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[1] The letters of consent are being filed separately.

legislation strengthening Title IV-D and imposing additional obligations on the States.

Nowhere is Congress' commitment to Title IV-D more clearly demonstrated than in the most recent revision to the Social Security Act, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Reconciliation Act"), Pub. L. No. 104-193, 110 Stat. 2105 (to be codified in various sections of 42 U.S.C.). In that statute, Congress enacted sweeping changes to social welfare programs, replacing Title IV-A of the Social Security Act (which provided for Aid to Families with Dependent Children ("AFDC")) to give the States more flexibility to structure their own welfare systems. At the same time that Congress *decreased* the States' obligations to provide the welfare services previously required under Title IV-A, Congress considerably *increased* the States' obligations to provide paternity and child support services under Title IV-D. The Reconciliation Act's special treatment of the child support program in contrast to other welfare programs dramatically illustrates Congress' continued commitment to Title IV-D and its emphasis on requiring States to provide specific child support and paternity services.[2]

Congress' repeated actions over the last two decades demonstrate that Title IV-D creates enforceable rights under 42 U.S.C. § 1983. The statute and legislative history confirm that Congress intended to benefit children and custodial parents deprived of parental support. The statute and legislative history, moreover, show that Congress repeatedly imposed binding obligations on the States to provide specific paternity and child support services. Finally, this history clearly distinguishes this case from those in which this Court has found that statutes do not create rights enforceable under § 1983.

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[2] The provisions of the Reconciliation Act are relevant because the case involves prospective relief. *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975). We point out in the text or footnotes when the provisions of the Reconcilation Act are not yet in effect.

ARGUMENT

I. THE LEGISLATIVE HISTORY DEMONSTRATES THAT TITLE IV-D CREATES RIGHTS ENFORCEABLE UNDER 42 U.S.C. § 1983

A statute creates rights enforceable under 42 U.S.C. § 1983 if: (1) "the provision in question was intended to benefit the putative plaintiff"; (2) the statute imposes "binding obligations on the governmental unit" rather than "reflects merely a 'congressional preference' for a certain kind of conduct"; and (3) the interest asserted is not "too vague and amorphous such that it is beyond the competence of the judiciary to enforce." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990) (quotations and brackets omitted); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981).[3] This analysis involves a review of the "entire legislative enactment," *Suter v. Artist M.*, 503 U.S. 347, 357 (1992); "the provisions of the whole law, and . . . its object and policy," *Pennhurst*, 451 U.S. at 18 (quotation omitted); and a review of the relevant legislative history, *see Wilder*, 496 U.S. at 509; *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 425-27 (1987); *Pennhurst*, 451 U.S. at 20-24, 26-27; *see also Suter*, 503 U.S. at 362. As explained below, the history of Title IV-D provides clear evidence that all the elements of this test are met, and that Title IV-D therefore creates rights enforceable under § 1983.

A. Children and Custodial Parents Deprived of Support Are the Intended Beneficiaries of Title IV-D

Title IV-D is unambiguously phrased in terms to benefit children and parents deprived of support from a noncustodial parent. *See Wilder*, 496 U.S. at 510. Title IV-D was passed:

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[3] This brief does not address the final part of the *Wilder* test, namely whether the statute precludes enforcement under 42 U.S.C. § 1983.

> [f]or the purpose of enforcing the support obligations owed by absent parents *to their children and the spouse (or former spouse) with whom such children are living*, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to *all children* (whether or not eligible for aid under part A . . .) for whom such assistance is requested . . . .

42 U.S.C. § 651 (emphasis added). The statutory provisions demonstrate an intent to benefit children and custodial parents. *See, e.g.*, 42 U.S.C. § 654(4) (as amended by Pub. L. No. 104-193, § 301) (State must provide "services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations" with respect to "each child" receiving assistance and "any other child, if an individual applies for such services"); 42 U.S.C. § 657 (as amended by Pub. L. No. 104-193, § 302) (rules for distribution of collections to families).

Congress' intent to benefit children and custodial parents, moreover, is evident in the legislative history of the statute. From the time Title IV-D was enacted in 1975, there has been a clear focus on vindicating the rights of *children* deprived of parental support. *See* S. Rep. No. 93-1356, at 42 (1974) ("The Committee believes that all children have the right to receive support from their fathers . . . including the right to have their fathers identified so that support can be obtained."); *id.* at 52 ("[T]he committee acknowledges that the legislation must recognize the interest primarily at stake in the paternity action to be that of the child."). As Senator Nunn eloquently stated within a few months after the enactment of Title IV-D:

> [T]he child support bill . . . represents a bill of rights for children—the right of every child to have some identity, the right of every child to have paternity established in a fair and efficient manner, and the right of every child to support from his natural parents. In essence, the primary beneficiaries are the children.

121 Cong. Rec. 26541 (1975).

This focus expanded to include custodial *parents* as well as children when Congress amended Title IV-D in 1984 to require States to enforce spousal support orders for custodial parents. 42 U.S.C. § 654(4)(B) (amended by Pub. L. No. 104-193, § 301). In addition, Congress' intent to benefit *all* families deprived of support was reinforced in 1984 when, among other things, Congress reiterated the requirement that services be provided to all families, including non-AFDC recipients. *Id.* § 651.[4] Similar sentiments were expressed in passing the 1988 amendments to Title IV-D,[5] and the Reconciliation Act. Indeed, in the statute enacted this year, Congress emphasized that it was retaining Title IV-D—despite a total revamping of other welfare programs—to protect children and parents:

> For more than two decades, the Federal Government has played a leading role in requiring States to establish and conduct strong child support enforcement programs. The fundamental goal of these programs . . . is to increase the financial security of children who live with one parent. This goal enjoys

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[4] *See* S. Rep. No. 98-387, at 1 (1984) ("[The 1984 amendments are intended to ensure] that all children . . . will receive assistance regardless of their circumstances."); 130 Cong. Rec. 9843 (1984) (Senator Dole, then Chairman, Senate Finance Committee) ("This bill . . . will help strengthen [the Federal-State] partnership for the good of all children."); 130 Cong. Rec. 9844-45 (1984) (Senator Armstrong) ("It is crucial that we enact this legislation quickly to prevent further suffering of [custodial parents] and the 2 million children who may be added to this list each year.").

[5] *See* 133 Cong. Rec. 35843 (1987) (Rep. Staggers) (amendments are "an essential rescue measure for the millions of children who have been thrust into or have been born into poverty through no fault of their own"); 133 Cong. Rec. 35874 (1987) (Rep. Pease) ("mandating immediate wage withholding . . . is another good idea that puts Congress on the side of the rights of children to support from their parents").

> nearly universal support among members of Congress and among the American public.

H.R. Rep. No. 104-651, at 1440 (1996).[6]

Congressional action confirms that these sentiments were not empty rhetoric because time after time Congress has taken specific action to address problems faced by families deprived of parental and spousal support. *See* Part B, *infra*. For example, over the years Congress has mandated in ever increasing detail that States adopt specific procedures for wage withholding to assist custodial parents obtain support. *See* pp. 12-13, 15, 19, *infra*. These provisions clearly are intended to benefit families such as plaintiff Freestone's, whose efforts to receive child support have been stymied by the father's frequent job changes and the State's failure to provide the required services. Congress also has mandated that States have in effect laws ensuring that voluntary acknowledgments of paternity (like the one which occurred in the case of plaintiff Judith Rogers) can be used as a basis to obtain support orders. *See* pp. 18-19 & n.19, *infra*. Finally, when Congress was apprised of the difficulties of interstate enforcement of support orders, as described in *amicus* American Public Welfare Association's ("APWA") brief at 12, Congress mandated new procedures for every State to follow in interstate cases. *See* pp. 19-21, *infra*. These specific actions reaffirm Congress' commitment to benefitting the women and children represented in the plaintiff class here.

Although Petitioner concedes that families are the intended beneficiaries of Title IV-D, Petitioner's Brief ("Pet. Brief") at 13, several *amici* argue that recapturing the cost of welfare is the sole goal of Title IV-D. That argu-

[6] *See also* 142 Cong. Rec. S8524 (daily ed. July 23, 1996) (Senator Rockefeller) ("[s]trengthening child support enforcement will truly help children of all income levels"); 142 Cong. Rec. H9407 (daily ed. July 31, 1996) (Rep. Johnson) (failure to collect child support payments "is catastrophic for women and children, and this bill fixes that system, an enormous advantage for women and children and a way off welfare").

ment ignores the fact that, since 1975, Congress has mandated that Title IV-D services be available to all families, including non-AFDC families, and that when some States ignored that requirement, Congress vehemently reiterated the requirement in 1984.[7] Moreover, the argument sidesteps the many enactments and reams of legislative history cited herein evincing Congress' intention to broadly protect children and parents deprived of support. Although fiscal conservation clearly is a benefit flowing from Title IV-D, Congress has made clear that Title IV-D serves more important societal goals:

> The immediate result [of Title IV-D] will be a lower welfare cost to the taxpayer but, more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S. Rep. No. 93-1356, at 42 (1974); *see* H.R. Rep. No. 100-159, prt. 1, at 73 (1987) ("The Committee wishes to emphasize the importance of paternity establishment and intends for these provisions to encourage paternity establishments even in cases where child support cannot be immediately collected.").[8]

[7] *See* H.R. Rep. No. 98-527, at 29 (1983) ("[T]he Committee is emphasizing its intention that [HHS] and the states vigorously implement a requirement that has been in the law since 1975. . . . Notwithstanding law and legislative history, some states have not enforced child support obligations as energetically for non-AFDC families as they have for AFDC families, and in a few states . . . services appear to be available only for families receiving AFDC benefits.")

[8] *See also* H.R. Rep. No. 98-527, at 29-30 (1983) (The success of Title IV-D cannot be measured "in terms of AFDC savings due to collections on behalf of recipients. . . . The Committee recognizes the larger societal responsibility for making sure that all children receive financial support. . . . The objectives behind the program are greater than merely recouping federal and state AFDC expenditures.")

B. Title IV-D Imposes Very Specific Binding Obligations on the States in Exchange for Federal Funds

A statute enacted pursuant to the spending power creates rights enforceable under § 1983 when it "unambiguously" imposes clear and "binding" obligations on the States in return for acceptance of federal money. *Pennhurst*, 451 U.S. at 19; *see Suter*, 503 U.S. at 360; *Wilder*, 496 U.S. at 510. Such statutes allow the States to exercise their choice to accept federal funds "knowingly, cognizant of the consequences of their participation." *Pennhurst*, 451 U.S. at 19.

The history of Title IV-D leaves no doubt that Congress "unambiguously" imposed clear, binding obligations on the States. From its inception, Title IV-D has contained mandatory, rather than hortatory, language informing the States of their obligations as recipients of substantial federal funds.[9] The statute also contains specific direction to the States as to the scope of their obligations. *See Wilder*, 496 U.S. at 512. Furthermore, in reaction to lax enforcement efforts by the States, Congress has reemphasized, refined, and supplemented these obligations.

This history, moreover, distinguishes Title IV-D from the statutes at issue in *Pennhurst* and *Suter*. In *Pennhurst*,

[9] Since 1975, the federal government consistently has paid the States at least two thirds of the costs of their Title IV-D programs. From 1975 to 1982, the federal government provided 75% of the money spent by States on paternity establishment and child support enforcement. *See* Social Services Amendments of 1974, Pub. L. No. 93-647, § 101, 1974 U.S.C.A.A.N. (88 Stat. 2337) 2716, 2732; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 174, 1982 U.S.C.A.A.N. (96 Stat.) 324, 403. In subsequent years, the ratio has increased for some services (up to 90%) and decreased for others (down to 66%). The federal government now matches 90% of expenditures for certain laboratory tests and implementation of certain computer systems and 66% of other expenses. 42 U.S.C. § 655(a) (as amended by Pub. L. No. 104-193, § 344(b)).

In addition, Title IV-D contains a financial incentive program to reward States "which perform in a cost-effective and efficient manner to secure support for all children who have sought assistance in securing support." 42 U.S.C. § 658(a).

this Court determined that section 6010 of the Social Security Act merely "express[ed] a congressional preference" for a certain type of treatment, 451 U.S. at 19, because the provisions of section 6010 were "hortatory, not mandatory," and Congress did not provide the States with funds to accomplish the purported goal of section 6010. 451 U.S. at 23. In *Suter*, the Court determined that the Adoption Assistance Act requiring States to use "reasonable efforts" to prevent the removal of children from their homes and destruction of families did not create enforceable rights because "[n]o . . . statutory guidance is found as to how 'reasonable efforts' are to be measured." 503 U.S. at 360. By contrast, in Title IV-D, Congress provided mandatory direction to the States as to their obligations to provide paternity and child support services and provided significant funds for that purpose.

1. The Enactment of Title IV-D. The driving force behind the enactment of Title IV-D was Congress' recognition that children and custodial parents need assistance in obtaining child support services (including paternity determination) and that the States were not providing adequate assistance.[10] The Senate Finance Committee noted that "most States ha[d] not implemented in any meaningful way the provisions of [prior] law relating to the enforcement of child support and establishment of paternity," S. Rep. No. 93-1356, at 46 (1974), and that "[t]he enforcement of child support obligations is not an area of jurisprudence about which this country can be proud." *Id.* at 43. To remedy this problem, Congress enacted

[10] Previous federal enactments in 1950 and 1967 had not been effective. Legislation enacted in 1950 had required state welfare agents to give notice to law enforcement officials of all children receiving welfare who were not receiving child support from absent parents. Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 321, 64 Stat. 477, 549-50. When this proved ineffective, Congress in 1967 required States to establish paternity and secure child support for all children receiving assistance under the Aid to Families with Dependent Children program. Social Security Amendments of 1967, Pub. L. No. 90-248, § 201(a), 81 Stat. 821, 877.

Title IV-D, the purpose of which is clear from the opening section, where Congress made available federal monies "[f]or the purpose of enforcing the support obligations owed by absent parents to their children, locating absent parents, establishing paternity, and obtaining child support." Social Services Amendments of 1974, Pub. L. No. 93-647, § 101, 1974 U.S.C.A.A.N. (88 Stat. 2337) 2716, 2732 (codified as amended at 42 U.S.C. § 651).

Because Congress envisioned that the States would bear the "basic responsibility for child support and establishment of paternity," S. Rep. No. 93-1356, at 46 (1974), Title IV-D mandated that States take specific, affirmative steps to establish paternity and enforce child support. In explicit mandatory language,[11] States were required to adopt a State plan for providing paternity establishment and child support enforcement services, and to designate a special organizational unit for that purpose. 42 U.S.C. § 654 (amended by Pub. L. No. 104-193, § 301). In the State plan, the States had to agree to (1) "undertake . . . to establish the paternity" of any child born out of wedlock who receives AFDC; (2) "secure support" for any child receiving AFDC; and (3) make "child support collection and paternity determination services . . . available" to non-AFDC families. In addition, the State agency was required to establish a service to locate absent parents and to enter into cooperative arrangements with other States to establish and enforce child support obligations. *Id.* Finally, States were required to comply with regulations promulgated by the Department of Health, Education and Welfare ("HEW"). *Id.*

[11] *See, e.g.*, Pub. L. No. 93-647, § 101(a) (as amended by Pub. L. No. 104-193, § 301) ("[a] State plan for child support *must* [include listed provisions and] *shall* be in effect in all political subdivisions"; "child support collection or paternity determination services established under the plan *shall* be made available [to non-AFDC families]"; "amounts collected as child support *shall* be distributed as provided in section 457"; any payment "required to be made under section 456 or 457 to a family *shall* be made to the resident parent, legal guardian, or caretaker relative") (emphasis added).

This enactment created the basic structure of Title IV-D that exists today. Although Congress has amended it and added to it, Congress has never changed the essential structure of the program, or the essential nature of the States' obligations.

2. The Child Support Enforcement Amendments of 1984. Despite the specific mandates established in 1975, Congress in 1984 found it necessary to pass bipartisan legislation[12] strengthening Title IV-D in reaction to a recognition that the States' existing child support enforcement programs continued to be ineffective. The legislative history of the 1984 Act is marked by forceful expressions of the need to "put some teeth" into Title IV-D's requirements. *See, e.g.*, 130 Cong. Rec. 23039 (1984) (Rep. Rostenkowski). Congress specifically added a "Sense of Congress" section to the 1984 enactment, stating that,

> there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program; [and] Congress is strengthening that program to recognize the needs of all children.

Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23, 1984 U.S.C.A.A.N. (98 Stat.) 1305, 1329. This perspective is also evident in the pronouncements of leading members of Congress with responsibility for drafting the legislation:

> Currently, there are wide variations in the effectiveness of the State programs. For example, if we look at families receiving welfare payments . . . six States account for 88 percent of all support collected but spend only 32 percent of the total administrative funds. . . . Clearly, the State programs must be reformed—to do a better job of collecting the support that is owed to children and to reduce their administrative overhead.

[12] The bill *unanimously* passed both Houses. *See* 130 Cong. Rec. 21776, 21783-84, 23048 (1984).

130 Cong. Rec. 9841-42 (1984) (Senator Dole, then Chairman of the Senate Finance Committee).[13]

Congress strengthened Title IV-D by requiring States to provide *spousal* support enforcement services in connection with child support services (previously, provision of spousal support enforcement services was left to the discretion of the State), 42 U.S.C. § 654(4)(B) (amended by Pub. L. No. 104-193, § 301). Moreover, the States, for the first time, were required to adopt state guidelines for determining the amount of child support awards, 42 U.S.C. § 667(a), to provide annual notification to individuals for whom support payments are collected of the amount collected, 42 U.S.C. § 654(5)(A), and to publicize the availability of child support enforcement services, 42 U.S.C. § 654(23).

But Congress did not stop there. Congress added "teeth" to Title IV-D by requiring "each State [to] have in effect *laws requiring the use of the following procedures* . . . to increase the effectiveness of the program which the State administers under this part," 42 U.S.C. § 666(a) (emphasis added): [14]

- mandatory income withholding in the case of child support arrearages;
- expedited processes for obtaining and enforcing child support orders and establishing paternity;
- state income tax refund offsets in the amount of any overdue support;

[13] *See also* 130 Cong. Rec. 9850 (1984) (Sen. Bradley) ("There is a wide disparity in performance among States . . . . The system is in major need of tightening up."); 129 Cong. Rec. 33039 (1983) (Rep. Schroeder) ("The performance of State child support enforcement programs has been spotty. . . . Because of the variation in performance it has become necessary to enact additional legislation to strengthen the child support enforcement effort.").

[14] The States could avoid having these laws only by "demonstrat-[ing] to the satisfaction of the Secretary"—using "data pertaining to caseloads, processing times, administrative costs, and average support collections"—that the required law would "not increase the effectiveness and efficiency of the State child support enforcement program." 42 U.S.C. § 666(d).

- liens against real and personal property for amounts of overdue support;
- a statute of limitations permitting paternity actions until at least the child's eighteenth birthday;
- posting of a bond or security by the absent parent to guarantee payment of overdue support;
- reporting of information on overdue support to credit agencies.

42 U.S.C. § 666(a) (amended by Pub. L. No. 104-193, §§ 314, 325, 367, 368 (to be codified at 42 U.S.C. § 666(a)).[15] For a limited number of the enumerated procedures (state tax refund intercept, liens, bonds or security, information to credit agencies), States were given the discretion to determine whether or not to use them in a specific case pursuant to guidelines which had to be "generally available within the State." 42 U.S.C. § 666(a).

3. The Family Support Act of 1988. In 1988,[16] Congress passed additional bipartisan legislation to further strengthen Title IV-D in response to identified concerns

[15] Congress even provided detailed specifications which the state laws must meet. For example, Congress dictated that wage withholding procedures, among other things, "*must* provide" that (1) income withholding be used when an absent parent falls one month or more behind in support; (2) withholding be provided "without the necessity of any application" or "further action"; (3) withholding procedures include specific procedural requirements; (4) "amounts withheld . . . be expeditiously distributed"; and that (5) employers be held liable "for any amount which such employer fails to withhold from wages due an employee following . . . proper notice", and be fined if the employer "discharges from employment, refuses to employ, or takes disciplinary action against any absent parent subject to wage withholding." 42 U.S.C. § 666(b)(1), (2), (4)(A), (5), (6)(C) (amended by Pub.L. No. 104-193, § 314) (emphasis added).

[16] In the Omnibus Budget Reconcilation Act of 1986, Congress prohibited States from allowing retroactive modification of child support orders. 42 U.S.C. § 666(a)(1). Congress was seeking to "prevent . . . the purposeful noncompliance by the noncustodial parent because of his hope that his child support obligation will be retroactively forgiven." S. Rep. No. 99-348, at 155 (1986).

that States were not doing enough to establish paternity and enforce child support. The House concluded that the States' track record in establishing paternity had been particularly bad:

> The Child Support Enforcement Amendments of 1984 have contributed to improving this situation but more remains to be done. Paternity establishments—the first step in the child support enforcement process—must be increased and more effective techniques must be found for establishing and enforcing support orders.

H.R. Rep. No. 100-159, prt. 1, at 40 (1987). The Senate noted serious problems with child support enforcement efforts by the States:

> One of the major elements in the Committee bill is a series of amendments to strengthen the child support enforcement program. The problem of nonsupport of children by their parents has become a serious one for this country. . . . Census Bureau data tell us that of the 8.8 million mothers with children whose fathers were not living in the home in the spring of 1986, 3.4 million, or nearly 40 percent of these mothers, had never been awarded support for their children. Fewer than one in five of mothers who had never been married had been awarded support. Of those who had been awarded and were due support in 1986, only half received the full amount they were due.

S. Rep. No. 100-377, at 8 (1988).[17]

The 1988 Act imposed additional requirements on the States to provide more effective child support and paternity services. Congress directed the Secretary to promulgate forthwith regulations regarding the time limits for a State to respond to requests for services from an applicant or another State, 42 U.S.C. § 652(h), and regulations establishing time limits for the State to distribute amounts collected to recipients. *Id.* § 652(i). These regulations, which were promulgated in August 1989, lay out in great detail what is required of the States. *See* 45 C.F.R. §§ 302.32(f), 303.2, 303.3, 303.4.[18]

Congress also refined some of the States' existing obligations. For example, States were required to adopt procedures that would *mandate* wage withholding for all support orders, 42 U.S.C. §§ 666(a)(1), (a)(8)(B), (b)(3) (amended by Pub. L. No. 104-193, § 314), whereas prior to 1988, wage withholding was required only in cases of arrearage, *see* p. 12, *supra*. In addition, States were required to adopt child support guidelines that are presumptively binding in state child support proceedings, 42 U.S.C. § 667(b)(2), and that are reviewed and updated every four years, *id.* § 667(a). (Prior to 1988, child support guidelines were not binding and there was no provision for updating them, *see* p. 12, *supra*.)

Congress also imposed new conditions mandating States to have in effect laws or procedures (1) for automatic review and adjustment of child support orders every three

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[17] *See also* H.R. Rep. No. 100-159, prt. 1, at 40 (1987) ("the track record on support payments by non-custodial parents is poor"); 134 Cong. Rec. 14248 (1988) (Senator Bentsen) ("The Congress enacted strong legislation in 1975 and 1984, but despite that legislation only a small fraction of children who live with single parents receive the full credit as awarded to them by the courts. Many receive nothing at all. The welfare reform bill before the Senate will help to remedy that situation. It will require the States to do a better job of establishing paternity.")

[18] For example, payments to families must be made within 15 calendar days of the end of the month in which the support is received. 45 C.F.R. §§ 302.32(f)(2), 302.32(f)(3). *See id.* (amounts collected by responding State in interstate case must be paid to collecting State within 15 days); *see also* 45 C.F.R. § 303.3(b)(3) (listing actions State IV-D agency must take to locate absent parents and requiring action within 75 days); *id.* § 303.4(d) (requiring State IV-D agency to at least begin to establish a support order within 90 days after locating absent parent); *id.* § 303.8(c), (e) (parents must be notified of right to review and adjustment of support order every 36 months; State IV-D agency must, within 15 days of receiving request for review or adjustment of support award, determine whether review is warranted).

years, 42 U.S.C. § 666(a)(10) (amended by Pub. L. No. 104-193, § 351); (2) requiring that the child and parties submit to genetic testing at the request of a party in a contested paternity case, 42 U.S.C. § 666(a)(5) (amended by Pub. L. No. 104-193, § 331); and (3) requiring that each parent furnish his or her social security number to the state agency administering birth certificates, 42 U.S.C. § 405(c).

4. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996. After some intervening amendments,[19] this year Congress enacted "the toughest child support laws ever passed by Congress," 142 Cong. Rec. S9396 (daily ed. Aug. 1, 1996) (Senator Pressler), as part of welfare legislation. Congress' treatment of Title IV-D in the Reconciliation Act of 1996 differs significantly from its treatment of other core welfare programs. Congress repealed all of Title IV-A containing AFDC and replaced it with a system of block grants designed to "increase the flexibility of States in operating a program designed to provide assistance to needy families." H.R. Conf. Rep. No. 104-725, at 264 (1996). Congress also explicitly limited the federal government's authority to pass regulations concerning the block grants. *See* Pub. L. No. 104-193, § 103 (to be codified at 42 U.S.C. § 617). Finally, Congress provided explicitly that the block grant system "shall not be interpreted to entitle any individual or family to assistance under any State program funded under [part A of the Act.]" Pub. L. No. 104-193, § 103(a) (to be codified at 42 U.S.C. § 601(b)).

In stark contrast, Congress retained the essential structure of Title IV-D. The House Committee Report explains:

[19] For example, in 1993, Congress required States to adopt procedures to simplify paternity establishment in both uncontested and contested cases. 42 U.S.C. § 666(a)(5) (amended by Pub. L. No. 104-193, § 331). Among other things, the 1993 amendments required the States to adopt a simple process for voluntary acknowledgment of paternity, including procedures by which the voluntary acknowledgment of paternity can form the basis for entry of a support order. *Id.*

> [A] major objective of the block grant approach followed by the committee is to reduce Federal rules and regulations. However, the committee felt that several provisions . . . should be retained. Thus, the committee proposal continues the current law requirements ensuring that States operate a child support enforcement program and a child protection program.

H.R. Rep. No. 104-651, at 1331 (1996). Unlike the amendments to Title IV-A, Congress did not limit the federal government's authority to pass regulations concerning Title IV-D. Nor did Congress include any statement that Title IV-D creates no entitlement to paternity and child support services.[20] The fact that Congress knew how to eliminate an entitlement (and in fact did so with respect to Title IV-A), but chose not to do so with respect to Title IV-D, provides critical evidence that Congress intended Title IV-D to continue to create enforceable rights.

Indeed, there was tremendous bipartisan support in Congress for fortifying Title IV-D.[21] The 1996 Congress

[20] An earlier welfare bill, H.R. 4, "The Personal Responsibility Act of 1995," introduced in the House on January 4, 1995, included a statement that there is no entitlement to Title IV-D services:

> Notwithstanding any other provision of law . . . , all entitlement of individuals to benefits established under the following programs . . . is terminated:
>
> (1) FAMILY SUPPORT.—The program of aid and services to needy families with children under part A of title IV of the Social Security Act, *the child support enforcement program under part D of such title* . . . .

H.R. 4, § 302, 104th Cong. (1995) (emphasis added). The provision eliminating any entitlement to Title IV-D services was dropped by the time the House Ways and Means Committee reported the bill to the House, *see* H.R. Rep. No. 104-81, at 13 (1995), and such a provision has not appeared in any legislation passed by either House of Congress.

[21] *See* 142 Cong. Rec. E1453 (daily ed. Aug. 1, 1996) (Rep. Morella) ("We will soon be able to finally crack down on deadbeat dads by enacting penalties with real teeth and establishing Federal registries to help track deadbeats."); 142 Cong. Rec. H9421 (daily ed. July 31, 1996) (Rep. Franks) ("The bill strengthens child support enforcement so that absent fathers will be located and required to pay child support.").

was concerned especially with the States' poor performance in establishing paternity:

> [P]aternity establishment is one of the major weaknesses of the current child support system. A significant fraction, perhaps as many as half, of the children on the [AFDC] program do not have paternity established. Obviously, until paternity is established, child support enforcement cannot even begin. Thus, the committee proposal includes a host of provisions that will result in improved paternity establishment performance by States.

H.R. Rep. No. 104-651, at 1418 (1996). Similar concerns were expressed about the States' efforts at interstate enforcement of support orders:

> The committee has received extensive information through letters and testimony that the current system of pursuing child support across States lines is far too sluggish to be effective. Here and elsewhere in the proposal, the committee takes strong and innovative action to repair a system that is universally regarded as broken. Data from the Federal Office of Child Support Enforcement show that whereas 30 percent of child support cases are interstate cases, only 10 percent of collections are from interstate cases.

Id. at 1405.[22] Congress believed that the new law would provide the States with additional tools to improve paternity and child support services. *See, e.g.*, 142 Cong. Rec. S9381 (daily ed. Aug. 1, 1996) (Senator DeWine) (the new statute gives "States added tools in their effort to track down the bank accounts of deadbeat dads").

Building on existing law requiring States to simplify procedures for voluntary acknowledgment of paternity and to adopt specific procedures for that purpose, *see* n.19, *supra*, Congress added to the list of procedures States must

[22] *See also* 142 Cong. Rec. H7759 (daily ed. July 17, 1996) (Rep. Roukema) ("The core of these child support enforcement reforms is the absolute requirement for interstate enforcement of child support, because the current, State-based system is only as good as its weakest link.").

have in effect a requirement that States have voluntary acknowledgment programs based in birth record agencies as well as hospitals. Pub. L. No. 104-193, § 331 (to be codified at 42 U.S.C. § 666(a)(5)). Moreover, States must provide notice "orally and in writing" to both parents about the consequences of providing a voluntary acknowledgment of paternity, and then the States must have procedures in place to ensure that a signed voluntary acknowledgment of paternity is considered a *legal finding* of paternity, subject to some conditions, that does not need to be ratified in court proceedings. *Id.* Likewise, Congress added to the list of procedures that the States must use to establish paternity in general. *See id.* (requiring the admissibility of genetic tests under listed conditions, without the need for foundation testimony or other proof of authenticity; creating a rebuttable presumption of paternity upon genetic testing results indicating threshold positive findings; eliminating the right to jury trial in paternity cases; and ensuring that putative fathers have a reasonable chance to initiate paternity actions).

With respect to enforcement of child support orders, Congress also imposed new obligations, including the requirement that the State provide notice of all proceedings as well as a copy of any orders to the parties. Pub. L. No. 104-193, § 304 (to be codified at 42 U.S.C. § 654(12)). The State must also establish and operate, by October 1998, a State Disbursement Unit "for the collection and disbursement of payments under support orders" and distribute any amounts payable under 42 U.S.C. § 657 within *two* business days after receipt. Pub. L. No. 104-193, § 312 (to be codified at 42 U.S.C. § 654B(a)).

The statute also requires the State agency to create two computerized databases—a "State Case Registry" and a "State Directory of New Hires"—and provides specific requirements about their contents and use. For example, the "State Case Registry" must contain specific information about each case handled by the State IV-D agency (*e.g.*, names of parents, birth date of child, status of case,

and the amount of periodic support due, the amount owed, collected, and distributed, and the amount of any arrearage). *Id.* § 311 (to be codified at 42 U.S.C. § 654A(e)). The "State Directory of New Hires" (which must be in place and operating by October 1, 1997) must contain information from every employer in the State with identifying information about every newly hired employee. The employers must provide this information within an allotted time (at most twenty days) and in an approved format. Further, the statute requires the States to (1) enter information received from employers into the database within *five* business days; (2) furnish the information to the newly created "National Directory of New Hires" within *three* business days after entry into the State system; (3) by May 1998 make automated comparisons of the social security numbers in the State Directory of New Hires and the State IV-D Case Registry; and (4) provide any matching information to the State IV-D agency. After the State IV-D agency receives the matching information, it must transmit a withholding notice to the employer within *two* business days. *Id.* § 313 (to be codified at 42 U.S.C. § 653A).

Congress also worked to address enforcement problems raised specifically by interstate cases. Some existing requirements such as income withholding are changed to make them easier in interstate cases, *see* Pub. L. No. 104-193, § 314 (to be codified at 42 U.S.C. § 666(a)(1)) (providing uniform definition of "income" for use in interstate cases); and States are required to have in effect various laws designed to ease interstate enforcement, *see id.* § 321 (to be codified at 42 U.S.C. § 666(f)) (Uniform Interstate Family Support Act must be in effect by January 1998); *id.* § 364 (to be codified at 42 U.S.C. § 666(g)) (laws relating to voiding fraudulent transfers). Congress also mandated that the State IV-D agency respond to interstate requests to enforce a support order within *five* business days and adopt procedures to ensure easier enforcement of out-of-state orders. *Id.* § 323 (to be codified at 42 U.S.C. § 666(a)(14)).

In addition, Congress required States to have in effect specific new procedures for use in all enforcement cases (including interstate cases) such as procedures:

- requiring that applicants for licenses—professional, commercial, and drivers—provide social security numbers;
- authorizing the States to revoke licenses in the case of past due support payments;
- requiring the State IV-D agency to enter into agreements with private financial institutions to develop and operate a system for identifying the assets of noncustodial parents; and
- ensuring that child support orders include health coverage, and that, where the noncustodial parent changes jobs, the State IV-D agency sends a notice of coverage to the new employer.

Id. §§ 317, 369, 372, 382 (to be codified at 42 U.S.C. § 666(a)). Moreover, because Congress concluded that "[c]umbersome court procedures have been a major impediment to the efficient operation of child support systems," H.R. Rep. No. 104-651, at 1415 (1996), the new statute specifies that the State IV-D agency must be able to use the following expedited procedures "without the necessity of obtaining an order from any other judicial or administrative tribunal," Pub. L. No. 104-193, § 325 (to be codified at 42 U.S.C. § 666(a)): (1) ordering genetic testing; (2) subpoenaing financial or other information; (3) obtaining access to governmental records (vital statistics, real estate, tax records, corporate ownership records); (4) obtaining access to certain private records (such as public utility records, cable television records, and financial institution records); (5) increasing automatically monthly payments to collect arrearages; and (6) securing assets by intercepting payments from state agencies, judgments, settlements, and lotteries, attaching assets held in a bank, and imposing liens.

* * * *

This review of the history of Title IV-D reveals two compelling features that make this statute vastly different from the statutes previously considered by this Court in *Suter* and *Pennhurst*: the mandatory nature of the requirements repeatedly imposed by Congress directly on the States[23] and the detail and specificity with which Congress repeatedly spoke. This history demonstrates conclusively that Congress has spoken "with a clear voice" "set[ting] forth a congressional command." *Wilder*, 496 U.S. at 512. The States, thus, for more than 20 years have been able to make an "informed choice" to accept federal funds. *Pennhurst*, 451 U.S. at 25.

C. The Obligations Imposed by Title IV-D Are Binding and Judicially Enforceable

In the face of this overwhelming evidence that Congress imposed mandatory binding obligations with increasing specificity over time, Petitioner and *amici* argue that these obligations are not binding or judicially enforceable because the statute and regulations require only "substantial compliance" with the provisions of Title IV-D.

[23] There can be no doubt that the States understood these requirements to be binding on them. The requirements highlighted above all contained clear, mandatory language. *See* n.11, *supra*; *see also* 42 U.S.C. § 666 (States "must have in effect" certain procedures); *id.* § 667(b) ("there shall be a rebuttable presumption" that the guidelines provide the appropriate amount of support); *id.* § 405(c)(2)(c)(ii) (state agency responsible for birth certificates must include parents' social security numbers in certificate). Congress was very clear when, by contrast, the States retained discretion about what to do. For example, in 1988, Congress clearly encouraged States to implement procedures simplifying paternity procedures. *See* Family Support Act of 1988, Pub. L. No. 100-485, § 111(d), 1988 U.S.C.C.A.N. (102 Stat.) 2350 ("each State is *encouraged* to establish and implement a simple civil process for voluntarily acknowledging paternity") (emphasis added). (In 1993, those requirements became mandatory, *see* n.19, *supra*, and in 1996, they became more specific, *see* p. 19, *supra*.) In addition, the 1996 statute gives the States the option to pass laws requiring grandparents to be liable for the support of children of minor parents. Pub. L. No. 104-193, § 373 (to be codified at 42 U.S.C. § 666(a)).

According to Petitioner, this standard requires only "compliance in at least 75% of the cases reviewed." Pet. Brief at 14. This argument is without merit.

First, Petitioner and *amici* argue that the "substantial compliance" language of 42 U.S.C. § 602(a)(27) renders the obligations of Title IV-D either non-binding, or judicially unenforceable. Pet. Brief at 14-15. But the language in § 602(a)(27) on which Petitioner hangs her entire argument *is no longer part of the statute.* Indeed, 42 U.S.C. § 602(a)(27) was repealed by § 103(a) of the Reconciliation Act. It was replaced by a section that requires, as a condition of receiving funds under Title IV-A, a "certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D." Pub. L. No. 104-193, § 103(a) (to be codified at 42 U.S.C. § 602(a)(2)).[24]

The only place that "substantial compliance" is found in Title IV-D is in 42 U.S.C. § 652(g)(1), which provides the substantive standard for the Secretary to use during an audit in assessing the States' efforts at paternity establishment.[25] It is also found in Title IV-A in 42

[24] In the original enactment of Title IV-D, 42 U.S.C. § 602(a)(27) did not include "substantial compliance" language. To the contrary, it required the States, as a condition of receiving Title IV-A funds, to "have in effect a plan approved under [Title IV-D] and operate a child support program in conformity with such plan." Pub. L. No. 93-647, § 101(c)(1)(5) (codified as amended at 42 U.S.C. § 602(a)(27), *repealed by* Pub. L. No. 104-193, § 103). The section was amended as follows in 1984 to include "substantial compliance" language: in order to receive Title IV-A funds, the State must have "in effect a plan under part D of the subchapter and operate . . . a child support program in *substantial compliance* with such plan." 42 U.S.C. § 602(a)(27), *repealed by* Pub. L. No. 104-193, § 103 (emphasis added). As noted, that section is replaced in the Reconciliation Act by a new provision deleting the substantial compliance language. The new provision is effective July 1997, or earlier if a State submits a Title IV-A plan before then. Pub. L. No. 104-193, § 116.

[25] That section states, in relevant part: "A State program under this part shall be found for the purposes of [the audit provisions]

U.S.C. § 603(h) (and its successor, new section 409 (a)(8) of the Social Security Act (to be codified at 42 U.S.C. § 609(a)(8)))[26] which provides a penalty the Secretary may impose as a result of adverse audit findings of the State's child support programs. Neither provision, by its terms, limits the States' obligation to provide paternity and child support services in the first instance. To the contrary, both provisions simply provide the standard against which the State will be measured to avoid the imposition of the financial penalty assessed against Title IV-A funds by the Secretary.

Second, the legislative history of Title IV-D refutes Petitioner's argument. The compelling evidence of Congress' continued strengthening of Title IV-D in response to lax enforcement by the States, *see* Part B, *supra*, clearly is inconsistent with the position advanced by Petitioner that the statute allows a State to disregard a portion of its caseload.

Third, the legislative history of the "substantial compliance" language in the statute and the regulations also refutes Petitioner's argument. When first enacted in 1975, Title IV-D required the Secretary to perform *annual* audits to determine whether the State had "an effective program meeting the requirements of section [602(a)(27)]." Pub. L. No. 93-647, § 101(c)(6)(A) (codified as amended at 42 U.S.C. § 603(h), *repealed by* Pub. L. No. 104-193, § 103). If a State was found not to have "an effective program," an automatic penalty was imposed—the State's

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not to have complied substantially with the requirements of this part" unless the State's paternity establishment percentage reaches a certain level. 42 U.S.C. § 652(g)(1) (amended by Pub. L. No. 104-193, § 341).

[26] 42 U.S.C. § 603(h) provides that "if a State's program operated under part D . . . is found as a result of a review conducted under [42 U.S.C. § 652(a)(4)] not to have complied substantially with the requirements of such part" the Secretary must reduce the State's Title IV-A funds by a certain percentage, unless the State adopts a corrective program. This section is replaced by a similar provision to be codified at 42 U.S.C. § 609(a)(8). Pub. L. No. 104-193, § 103. The new provision is not yet effective. *Id.* § 116.

Title IV-A money was reduced by five percent. *Id.* From the beginning, however, HEW expressed concern about the harshness of such an automatic penalty and the fact that it would impact the intended beneficiaries of the funds. *See* 41 Fed. Reg. 55,345, 55,346 (1976) ("The Department recognizes that this unfortunate result is a possible consequence should the statutorily required penalty be imposed."). Indeed, in 1980, the Department of Health and Human Services ("HHS") balked at having to apply the automatic sanction to States under the audit standards, and proposed regulations which included a "substantial compliance" test for auditing purposes. The purpose of the proposed "substantial compliance" test was to give HHS "greater discretion in the application of the penalty, so that States which operate effective programs but are nonetheless technically out of compliance with one or more requirements will not automatically be subject to penalty." 45 Fed. Reg. 69,495, 69,495 (1980). These proposed regulations were never adopted.

Instead, Congress enacted the Child Support Enforcement Amendments of 1984, which, as explained above, were intended to significantly strengthen—not weaken, as propounded by Petitioner—the requirements imposed on the States. *See* pp. 11-13, *supra*. At the same time, Congress amended the auditing provisions in Title IV-A (42 U.S.C. § 603(h)) to include a "substantial compliance" requirement, *see* n.26, *supra*. Congress also changed to *triennial* audits and altered the auditing standard to avoid imposition of harsh financial penalties against States whose noncompliance was only of a technical nature. *See* H.R. Rep. No. 98-527, at 44 (1983) (noting that current penalty "has never been applied . . . because of its severity in relation of the nature of non-compliance . . . . In place of the 5 percent penalty provision, the bill provides for a graduated penalty system with correction periods for programs found to be out of compliance with Title IV-D requirements."); S. Rep. No. 98-387, at 33 (1984) ("Unlike present law, which requires a penalty in every case where the audit discloses any area of non-compliance, [the new statute allows] the

penalty to be waived if the Administrator finds that the noncompliance is not substantial and has no significant adverse impact on the effectiveness of the State's program.")

Contrary to Petitioner's argument, this new auditing standard did not alter the States' obligations to comply in all cases with the terms of Title IV-D. Congress was explicit in its understanding of the constancy of the requirements before and after the 1984 amendments:

> Title IV-D presently requires that an annual audit be made of State child support enforcement programs to determine their *compliance with all statutory requirements* . . . .
>
> The bill requires that each State's program [now] be reviewed not less frequently than every 3 years. The Committee believes that it is not cost effective to conduct annual audits of programs which have had consistently excellent records of performances. Administrative resources could be better used for more detailed and frequent scrutiny of programs which appear to be having difficulty *in achieving full compliance*.

H.R. Rep. No. 98-527, at 44 (1983) (emphasis added). Indeed, Congress explained that the new auditing provisions, which would be based on performance standards determined by HHS, would provide "minimum acceptable levels" of success required of the States. S. Rep. No. 98-387, at 32-33 (1984). Congress specifically rejected the argument Petitioner advances now—that the new standard relieved the States of an obligation to provide services in *all* cases:

> The Committee does not intend that its endorsement of performance standards should be seen as sanctioning a simple short-term cost-effectiveness approach which would discourage States from serving clients with more difficult and costly problems or from devoting resources to such elements as paternity determination which may involve high initial costs.

S. Rep. No. 98-387, at 32-33 (1984).

Likewise, since 1984, HHS has taken the position that the substantial compliance standard does not limit the States' obligations to meet the requirements of Title IV-D. Soon after the enactment of the 1984 amendments, HHS promulgated regulations implementing the new auditing standards. *See* 50 Fed. Reg. 40,120 (1985) (final regulations); 49 Fed. Reg. 39,489 (1984) (proposed regulations). Contemporaneously with those regulations, HHS promulgated *other* regulations clearly indicating that States are required to comply with the substantive requirements of Title IV-D in *all* cases.[27]

For example, in May 1984, HHS published rules for case assessment and prioritization, but emphasized that, although prioritization is a tool for a more effective program, States must meet Title IV-D requirements in all cases:

> Since we believe that all cases should receive some level of effort to achieve the desired program goal, we want to ensure that these regulations are not construed to imply that it would be permissible for States to neglect or exclude certain cases or classes of cases.

49 Fed. Reg. 36,773, 36,773 (1984); *see also id.* ("If a State adopts a case prioritization system, the State must continue to meet the requirements in Part 302 which include performing all of the functions of the program, that is locating the absent parent, establishing paternity and establishing and enforcing support obligations for AFDC and non-AFDC cases."); *id.* at 36,775 (States "may *not*

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[27] Before the 1984 amendments, HHS had made clear that the scope of the audit regulations did not determine the States' obligations to comply with Title IV-D. Specifically, in 1982, HHS promulgated regulations limiting the auditing function to a review of statutorily-mandated requirements. HHS eliminated audits of requirements mandated only by the regulations. HHS emphasized that this change did not alter the requirement that States comply with all regulations. *See* 47 Fed. Reg. 24,716, 24,717 (1982) (fact that HHS would not audit to enforce provision requiring safeguarding of information "does not alter the long standing Federal requirement that information be safeguarded").

orient their programs entirely toward financial output by focusing solely on the amount of support or dollar amount that may be obtained in each case. . . . This could result in the State IV-D agency failing to comply with the requirements of its IV-D State plan in the sense that certain functions of the program, such as paternity establishment, might be ignored.")

In addition, in promulgating other regulations to implement the 1984 legislation, HHS rejected requests from the States for flexibility in using some of the statutorily mandated procedures. For example, with respect to wage withholding, HHS stated:

> [The States] urged that the regulation be more flexible in this area, giving the State an option as to whether or not to implement withholding in these cases. . . .
>
> The statute is very clear that withholding must be used in *all* cases being enforced under the State plan when the absent parent fails to make payments equal to the support payable for one month. We cannot, therefore, give States this type of flexibility.

50 Fed. Reg. 19,608, 19,623 (1985) (emphasis added); *see also id.* ("The intent of the statute is to provide an administrative enforcement remedy which is equally available in all cases"); *id.* at 19,624 (rejecting request for more time to implement wage withholding "in all existing cases by October 1, 1985" because it "will entail a major effort" because the effective date is specified in the statute). The passage of these regulations contemporaneously with HHS' implementation of the "substantial compliance" standard for audits demonstrates that HHS saw no conflict between its statements that States must comply with the requirements of Title IV-D in *all* cases and the use of a substantial compliance standard for purposes of assessing a financial penalty.

HHS has adhered to the policy that the "substantial compliance" standard for auditing does not limit the States' obligations to comply with Title IV-D. *See* 54 Fed. Reg. 32,280, 32,290 (1989) (rejecting States' request for flexibility in the percentage of cases that would

be handled in any given three month period; "a standard based on the percentage of actions taken out of the total actions needed to be taken is not a measure of prompt response to requests for services"). Indeed, in the most recent regulations streamlining the auditing procedure, HHS emphasized that the changes did not limit the States' obligation to comply with Title IV-D requirements:

> While *program* regulations specify how States must operate IV-D programs to be in compliance with State plan requirements and what program expenditures may qualify for Federal funding, *audit* regulations specify those requirements which must be met in order for a State to be determined to be in substantial compliance with the requirements of title IV-D of the Act and to avoid fiscal penalties.
> . . .
>
> *We emphasize that States are required to meet all Federal requirements contained in program regulations, whether or not the requirements are included under § 305.20* [*the audit regulations*]
> . . .
>
> States still must meet the requirements of each specific regulation cited.

59 Fed. Reg. 66,204, 66,212 (1994) (emphasis added). These audit regulations provide the clearest statement by the agency that audit regulations are distinct from the more specific and wider ranging requirements of the statute.

The "substantial compliance" language in the auditing scheme, therefore, does not limit the nature or scope of the States' obligations to provide paternity or child support services. Rather, the auditing provisions provide the standard against which the Secretary will judge the States in determining whether to impose a financial penalty against the State's Title IV-A funds. Contrary to Petitioner's argument, the "substantial compliance" language does not in any way make the rights created by Title IV-D

less binding on the States or less enforceable by the judiciary.

* * * *

The legislative history recited above demonstrates clearly that Title IV-D creates rights enforceable under § 1983 because the statute was intended to benefit children and parents deprived of support and the statute imposes binding obligations on the States that are sufficiently specific and definite to be enforceable. This review also demonstrates the fallacy of the arguments advanced by Petitioner and *amicus* APWA that Respondents seek to have this Court usurp the legislative and executive functions by enforcing the terms of Title IV-D against the States.[28] Congress has repeatedly spoken about the need to improve paternity and child support services, and has clearly told the States what is expected of them. Respondents simply want Petitioner to live up to the bargain she made as a condition of accepting money from the federal government.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request that the Ninth Circuit's decision be affirmed.

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[28] *See* Pet. Brief at 19 ("If Respondents want to increase the amount of resources devoted to child support enforcement . . . they have a more appropriate forum than the courts."); APWA Brief at 20 ("The decision of whether services should be expanded, maintained or cut altogether should be made by the executive branch and by Congress.")

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APPENDIX

APPENDIX

American Association of University Women

The American Association of University Women (AAUW) has over 160,000 members in 50 states and is dedicated to promoting education and equity for women and girls. Assuring state compliance with the requirements of the federal-state child support enforcement program is consistent with AAUW's commitment to fair and equitable treatment, especially for women, in all federal programs.

American Jewish Congress Commission for Women's Equality

The American Jewish Congress Commission for Women's Equality (Commission) is an activist leadership group of Jewish men and women committed to vigorously pursue full and equal rights for women within a Jewish context. One of the Commission's principal goals over the years has been strengthening the Jewish family as well as the families of all Americans. The Commission believes that permitting suits in the courts against states to enforce child support services is important in achieving that end.

Americans for Democratic Action, Inc.

Americans for Democratic Action (ADA) is a nonpartisan organization founded in 1947. ADA's members are citizens from every state in the nation, working in sustained political and legislative action to help formulate and achieve significant social change through government action.

California Women's Law Center

The California Women's Law Center (CWLC) is a private, non-profit, public interest law center specializing in the civil rights of women and girls. CWLC was estab-

lished in 1989 to address the comprehensive rights of women and girls in the following priority areas: sex discrimination, reproductive rights and health care, family law, violence against women, and child care.

Center on Social Welfare Policy and Law

The Center on Social Welfare Policy and Law (Center) works to promote fair administration of income support programs that meet fundamental human needs of low-income persons. Since poor people's access to the courts is essential to achievement of that goal, the Center has represented low-income persons seeking to enforce federally created rights in the Aid to Families with Dependent Children (ADFC) program. The Center's *amicus curiae* brief in *King v. Smith*, 392 U.S. 309 (1968), presented the statutory claim upon which the Supreme Court relied in confirming the legal entitlement of ADFC. In *Rosado v. Wyman*, 397 U.S. 397 (1970), a Center case, the right to enforce federal AFDC plan requirements was upheld. Now that Congress has repealed the AFDC program and reduced income support funding, meaningful access to the courts to assure state compliance with child support enforcement plan requirements is critical to the low-income families the Center serves.

Coalition of Labor Union Women

Founded in 1974, the Coalition of Labor Union Women (CLUW) is a national association of over 20,000 union members that advances the benefits of organized workplaces for women and promotes women's leadership development within the labor movement. CLUW is also an advocacy organization, working on behalf of millions of American working women to promote affirmative action, leadership, health care reform, pay equity, child care options, and reproductive health. CLUW supports social and economic justice for working women.

Federally Employed Women, Inc.

Federally Employed Women, Inc. (FEW), is an international non-profit membership organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW has focused on two primary goals: to eliminate sex discrimination and sexual harassment and to enhance career opportunities for women in government. FEW supports full enforcement of child support payments that are awarded by the courts as part of its efforts to ensure economic empowerment for women and their families.

Gray Panthers

The Gray Panthers work in areas of multigenerational concern to eliminate injustices, discrimination, and oppression based on age, sex, race, ethnicity and religion, sexual or political preference. Seeking to build a socially responsible society and heighten opportunities for all people to reach their full potential, the Gray Panthers work independently and in coalition with other groups to achieve both short term social and economic changes and ultimately a democratic society that serves human needs.

Greater Upstate Law Project, Inc.

The Greater Upstate Law Project, Inc. (GULP), is a not-for-profit, public interest law center that focuses on legal issues affecting low-income individuals and families throughout New York state. In addition to a direct counsel role, GULP provides litigation assistance in a variety of substantive areas, including on issues of welfare, disability, housing, and family law. GULP staff also advocate on the state and national levels on statutory and regulatory issues that affect the poor. In the area of family law, GULP concentrates generally on child support, domestic violence and custody issues. In particular, GULP attorneys have litigated several issues involving the federal-state child support enforcement program, including the

right to receive the $50.00 pass-through, and to receive proper collection and distribution of child support payments. GULP believes that if litigants are no longer able to pursue claims against state child support agencies to ensure that those agencies adhere to statutory and constitutional directives, large numbers of custodial parents will suffer.

Harriet Buhai Center for Family Law

The Harriet Buhai Center for Family Law (Center) is the largest provider of pro bono family law/domestic violence assistance for low-income parents in Los Angeles. Annually the Center assists nearly one thousand persons, the majority of whom are single-parent, female-head-of-household parents who do not receive child support for their childen from the other parent. The Project focuses on individual, legislative, and public policy advocacy to improve the collection of child support for low-income residents of Los Angeles County. The Center believes that individually initiated lawsuits sanctioned under Section 1983 are the best hope to compel accountability in a program which, over nearly a decade of observation and effort, has failed to provide the basic services it is funded to provide.

Jewish Women International

Jewish Women International (JWI) was founded in 1897 as B'nai B'rith Women by a group of Jewish women who sought to improve the quality of life for women in their communities. Now an organization of over 50,000 women in the United States and Canda, JWI continues to speak out on issues that affect women—in their communities, families, and in society. JWI believes that custodial parents are entitled to enforcement services to ensure the receipt of child support.

Mississippi Human Services Agenda

The Mississippi Human Services Agenda (Agenda) was incorporated in 1989 as a private, non-profit organization

dedicated to using research and advocacy in the struggle against discrimination and poverty. In the struggle for equity and justice, the Agenda has fought for the rights of women and children, for poor people, for people of color, for persons with disabilities, and for those who are marginalized in our society. It has assisted in legislative as well as legal efforts to ensure the rights of persons that the popular culture dismisses.

National Association of Social Workers, Inc.

The National Association of Social Workers, Inc. (NASW) is the largest association of professional social workers in the world with over 155,000 members in 55 chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is committed to improving the quality of life through utilization of social work knowledge and skills, promoting the quality and effectiveness of social work practice, and advancing the knowledge base of the social work profession. In its policy on Aid to Families with Dependent Children, NASW supports the principle that a nationwide system to enforce child support payments is essential to help ensure that children receive adequate and regular economic support that is fundamental to their security and development.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. (NCJW), is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy, and community service to improve the quality of life for women, children, and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members in over 500 communities around the country. Based on NCJW's *National Resolutions*, which support "policies and programs which provide an adequate level of services and income that meet basic human needs while encouraging self sufficiency," NCJW joins this brief.

National Legal Aid and Defender Association

The National Legal Aid and Defender Association (NLADA) is the largest national organization devoting all of its resources to ensuring equal access to the justice system for all poor people. Many of NLADA's member programs represent indigent women who could be helped in providing food, shelter, health care, and other basic necessities of life for their families through an appropriately managed child support enforcement program. It is also important to the members of NLADA that individuals be able to enforce their federal rights through judicial action.

National Women's Law Center

The National Women's Law Center (Center) is a non-profit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families, including family support, income security, employment, education, and reproductive rights and health—with special attention to the needs of low-income women. The Center has been a leader in advocating for a strong federal-state child support enforcement program and has actively monitored Congressional efforts to improve the program. The Center has participated as counsel, provided assistance, or participated as *amicus curiae* in a range of cases interpreting the requirements of a host of public benefit programs, including the child support enforcement program, and has a strong interest in ensuring that individuals eligible for child support enforcement services are able to enforce their right to obtain these services.

Northwest Women's Law Center

The Northwest Women's Law Center (Law Center) is a non-profit, public interest organization dedicated to protecting the legal rights of women through litigation, education, legislation, and the provision of legal information and referral services. The Law Center provides these services to women throughout Washington state and the Pacific Northwest. The Law Center has worked to improve child support laws and their enforcement both through direct representation and through joining numerous *amicus curiae* briefs. In a recent case, the Law Center represented a number of custodial parents in a class action seeking to require the Washington State Office of Support Enforcement to calculate and collect interest on delinquent child support payments. On the legislative front, the Law Center actively worked to achieve enactment of Washington's state-wide child support schedule and has since worked to preserve the schedule. Most recently, the Law Center has been involved in legislative efforts supporting the suspension of driver's and professional licenses for failure to pay child support.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a national, non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. Among NOW LDEF's major priorities is securing economic justice for all women. In furtherance of that goal, NOW LDEF has litigated or appeared as *amicus curiae* in a variety of cases involving women's rights to public benefits, including cases to improve provision of child support services to poor women such as *Barnes v. Anderson*, 980 F.2d 572 (9th Cir. 1992), and *Collazo v. Bane*, 92 Civ. 5468 (E.D.N.Y. July 2, 1996).

Paternal Involvement Project

The Paternal Involvement Project (PIP) is a public-private venture in Chicago that seeks to help non-custodial fathers of children on welfare become more involved

financially and emotionally with their children. Since its inception as a demonstration project in 1993, the Project has provided a mix of education, jobs, parenting, and case management services to low-income, minority (mostly African-American) men who want to become more involved fathers. The Project also seeks to ensure that federal and state public policies encourage fathers' efforts to support and be involved with their children.

Planned Parenthood Federation of America, Inc.

Planned Parenthood Federation of America, Inc., is the world's oldest and largest voluntary family planning organization. Planned Parenthood believes that everyone has the right to choose when or whether to have a child—and that every child should be wanted and loved. Planned Parenthood affiliates operate nearly 1,000 health centers nationwide. They provide medical services and sexuality education for millions of women, men, and teenagers each year. Planned Parenthood believes that child support is essential for women raising children and that the assurance of such support underlies women's ability to make voluntary childbearing decisions.

Reform Organization of Welfare

Reform Organization of Welfare (ROWEL) is a 1,000-member statewide organization in Missouri of people in poverty and their allies working to reduce poverty and prejudice. Formed in 1972 by a coalition of people of faith concerned about poverty and the welfare system, two-thirds of ROWEL's Board members are people in poverty, including AFDC recipients, persons with disabilities, and low-wage workers. Many of ROWEL's members would not need public assistance if their children's father were paying his fair share. Other members who are fathers have experienced negative consequences from the slow pace of winning adjustments to child support orders when their incomes declined. ROWEL has an important interest in improving the administration of Missouri's child support enforcement program.

Society of American Law Teachers

With almost 800 members at over 140 law schools, the Society of American Law Teachers (SALT) is the largest individual membership organization of people who teach in American law schools. Since its inception in 1974, SALT has addressed issues of access to justice and discrimination in many areas of American life.

Women Employed

Women Employed is a national membership organization of working women, based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women to improve their economic status and to remove barriers to economic equity through advocacy, direct service, and public education. Women Employed strongly believes that for women trying to gain or maintain economic self-sufficiency, the child support to which they are entitled is a vital portion of their income. Their right to sue to force states to carry out their child support enforcement obligation is crucial to their ability to collect this support and help them move towards self-sufficiency.

Women's Law Project

The Women's Law Project (Law Project) is a Philadelphia-based, non-profit, public interest legal center, dedicated to improving the legal and economic status of women and their families through litigation, public policy development, and public education. Since its founding in 1974, family law, and in particular the economic rights of women and childen upon divorce, has been a major focus of the work of the Law Project. The Law Project has brought litigation on family law issues, including *Bonds v. Snider*, a lawsuit against the Pennsylvania Department of Public Welfare for its failure to insure that the Philadelphia Family Court offers all federally mandated child support services in intercounty and interstate

cases. The Law Project also operated the Philadelphia Child Support Project, a comprehensive effort to increase the number of Philadelphia children who receive adequate and consistent child support from absent parents. Based on its substantial work in the area of child support, the Law Project believes that the right of families to sue to enforce states' obligations under Title IV-D is critical to protecting their right to child support enforcement services.

Women's Legal Defense Fund

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has worked for more than a decade at the national, state, and local levels to reform the nation's child support system by preparing materials for public education, providing technical assistance to federal and state policymakers and advocates, conducting research, and participating as *amicus curiae* in child support cases in state and federal courts.

Women's Rights Litigation Clinic

A permanent part of Rutgers Law School-Newark since 1973, the Women's Rights Litigation Clinic (Clinic) is devoted to eliminating sex discrimination and furthering the rights of women. Clinic students, under faculty direction, pursue legal remedies for the gender injustice that pervades our society in courts, legislatures, and administrative bodies. An important concern is the well being of divorced women and the children within their charge. The Clinic is also concerned with the need for access to the courts to remedy the injustices women suffer.

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In the
Supreme Court of the United States
October Term, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
Petitioner,

vs.

CATHY FREESTONE, et al.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

Motion for Leave to File 37 Page *Amicus Curiae* Brief of the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School in excess of the 30 Page Limit

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University of Chicago Law School
In Support of Respondent

December 27, 1996

4 pp

Motion for Leave to File 37 Page *Amicus Curiae* Brief of the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School in excess of the 30 Page Limit

The Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, by its attorney, Gary H. Palm, moves for leave to file its 37 page brief which is in excess of the 30 page limit for the following reasons:

1. Gary H. Palm misunderstood the United States Supreme Court rules by referring to his outdated 1995 Sullivan's Law Directory which indicated that typewritten *Amicus Curiae* briefs must have no more than 65 pages, U.S. Sup. Ct. Rules 34(g), Sullivan's Law Directory, p. 12c (1995). The double-spaced version of the *Amicus Curiae* brief runs 63 pages.

2. Based on a conversation with a member of the staff of the Clerk of this Court, Rebekah Everest, Mr. Palm's secretary, learned that the brief should be single-spaced, even though it was produced by our computer word processor.

3. Mr. Palm mistakenly concluded that the 65 page limit for the double-spaced brief under the old Rules would apply even though the brief that was filed was single-spaced.

4. The *Amicus Curiae* brief of the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School presents a special perspective in this case. It is the only program filing an *Amicus Curiae* brief in this case that represents individual clients on a regular basis in seeking child support enforcement services from a State under Title IV-D of the Social Security Act.

5. Both sides consented to the filing of this *Amicus Curiae* brief.

6. The 37 page brief was filed in October, 1996 and was not returned by the Clerk of the Court. Mr. Palm assumed that the brief was in proper form. Hunt André, a Senior Law Student, working under Mr. Palm's supervision, called the clerk in November, 1996 and verified that the brief was filed and in proper form.

7. Mr. Palm first learned that the brief was too long when he called in for his messages on December 26, 1996, and received the message from the Clerk of the Court.

8. There is insufficient time before the January 6, 1997 scheduled argument to revise the brief and have it distributed.

9. Counsel apologizes to the Court for his mistake.

WHEREFORE, the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School respectfully requests that it be granted leave to file its 37 page *Amicus Curiae* brief.

Respectfully submitted,

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December 27, 1996

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No. 95-1441

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LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,
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Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ANTI-POVERTY PROJECT OF THE EDWIN F. MANDEL LEGAL AID CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL IN SUPPORT OF RESPONDENT

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January 6, 1997

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Court Rule 37, *Amicus Curiae* respectfully submit this brief in support of Respondent's request that this Court affirm the Ninth Court decision that, by creating a private right of action, would uphold Congressional intent to confer upon mothers and children the right to prompt child support enforcement services. Consent to the filing of this brief has been granted by counsel for all parties and letters indicating such consent have been filed with the Clerk of this Court.

The Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School provides services to assist women and children in obtaining the appropriate governmental services to help them achieve their economic and personal goals. Almost all of our clients are single mothers who initially ask for help in obtaining child support enforcement services from the State of Illinois under Title IV-D. Many have been waiting years for Illinois' IV-D agency, the Illinois Department of Public Aid ("IDPA") to take the next step in their case. Some have waited up to five years without even receiving an initial interview. Few of our clients have received timely services. In *every* case that the Anti-Poverty Project has sought a written explanation, the IV-D agency has admitted to serious violations of federal regulations but has claimed that all that can be done is for the client to wait her turn in line. Our clients need recognition by this Court that they can enforce the federal time limits through §1983 actions in state and federal court.

The Anti-Poverty Project expects to seek enforcement of Title IV-D deadlines mostly in state courts. Usually the §1983 claims will be made in the child support proceeding itself. When IDPA misses deadlines in ordering blood tests or obtaining the father's pay records, for example, the Project may seek to use §1983 to have the Court order IDPA to obey federal regulations and use its contempt powers if necessary. When necessary, a separate state chancery action can be used to obtain prompt services for that individual. Because the Anti-Poverty Project has only one attorney, a part-time social worker and fourteen University of Chicago law students, it is not in the position to bring many class actions in federal court. Nonetheless, it is prepared to do so if the State agencies remain so inadequate. At present, the Project is the only program in the State of Illinois working to implement Title IV-D rights.

For most women, child support is needed to move from welfare to work. The Anti-Poverty Project helps each client develop her own employability plan, including needed government benefits for training and job placement. Our

clients often need help with day care, transportation costs, initial employment expenses and suitable clothing.[1] While some of these costs can be obtained from the government and private charities, many cannot. With the new two year limits on welfare grants in Illinois as recently passed by Congress in the Welfare Reform Act,[2] our clients cannot stay on AFDC waiting out the State's delays any longer. They need enforceable rights immediately to get their cases moving again so that they can get off welfare within the next two years.

SUMMARY OF ARGUMENT

Without §1983 remedies, mothers and their children will have no recourse to enforce their right to prompt child support enforcement. Congress and the President gave all American mothers[3] and children the right to obtain prompt child support enforcement services from the States. Congress specifically instructed the Secretary of Health and Human Services to adopt "standards establishing time limits" so that each case would proceed in a timely fashion. Each State's Governor agreed to obey these regulations when the Governor reviewed and approved the State Plan.

The U.S. Department of Health and Human Services has repeatedly found that Illinois[4] has been, and continues to be out of full compliance or even substantial compliance (75%) with many time limits since the mid-1980's, yet it has never penalized Illinois for its negligence. Mothers and children in Illinois should not be prevented by HHS' indifference to their plight from enforcing deadlines in their individual cases. Individual mothers and children must be able to use §1983 to enforce these deadlines and obtain services. After all, the State governments entered into a contract agreeing to meet these deadlines. If it cannot meet the deadlines, Illinois should turn the federal money over to other entities that can meet the deadlines or fire those who are responsible for the disaster and replace them with effective managers. Literally

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[1]The individual clients we referred to in this brief have given their consent to disclosing their names.

[2]The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 1996, 110 Stat. 2105 (1996).

[3]The overwhelming number of custodial parents are mothers and will be referred to interchangeably as "mothers", "custodial parents" or "IV-D recipients."

[4]This brief will frequently analyze the performance of the state of Illinois in complying with its IV-D requirements, as the State of Illinois has authored an *Amicus* brief representing the States. Moreover, it is also the State with which we have the most direct experience.

millions of mothers and children are suffering in poverty or near poverty. As these children become hungry three or more times a day, grow and need new clothes and have the other expenses of growing up in America, their mothers struggle alone to provide and the Government fails them. Fathers flaunt the system; states are more effective collecting from parking violations scofflaws than they are from deadbeat dads.

Illinois collects a mere $2.30 for every dollar spent on administrative expenditures, ranking 48th in collections out of 54 states and territories in 1993. It is no wonder the costs to the State in lost reimbursement of AFDC and the future costs of dependency on government benefits is staggering. Illinois manages to obtain reimbursement for AFDC expenditures in only 8.1% of AFDC cases. These financial costs would be greatly reduced if the States met their deadlines. The human costs are incalculable. With a two-year limit on AFDC and the failure of the State to enforce child support, Illinois AFDC recipients are scared and trapped. Even with entry-level jobs and day care subsidies, most will not be able to make it without child support. Child support collections are vital to meet the extra costs of work. Illinois pays an AFDC grant of $377 per month for a family of three. Savings are out of the question, as rent alone in Chicago is usually greater than $377. Congress and the Department of Health and Human Services required Illinois to obey time limits, and the States agreed. These time limits must be enforceable now in state and federal courts so that these mothers and children have a fair chance to obtain enough funds to get off welfare in two years.

Section 1983 is a necessary tool for enforcing the rights of mothers and children. Individuals can use §1983 rights to enforce the time limits and can do so without flooding federal courts. In Illinois, the Project's clients already are relying on §1983 in state court child support proceedings to move for the setting of scheduling orders to force Illinois to comply with the federal deadlines. The State's Attorney and the Illinois Department of Public Aid always object and move to withdraw. The State takes the absurd position that individuals cannot enforce these rights to prompt action but must instead drop out of the IV-D system entirely. This position vividly shows that the State has no intention of obeying the deadlines. (Most mothers do not want to lose the other IV-D services that are not available to private or legal aid attorneys, such as income tax refund intercepts, Federal and State Parent Locate Services and interstate enforcement.). So far, the trial judges have recognized the supremacy of §1983 and federal law. They have refused to allow Illinois to withdraw its

services and have ordered more vigorous action to make up for past delays that violated federal law. In other situations of delay in the state agency before a case gets to court, individuals need §1983 equitable or mandamus actions in state court to enforce the federal deadlines. Since the State takes the position that there are no administrative remedies, §1983 actions are the mothers' and children's only recourse. The Illinois statutes do permit a Request for a Written Explanation of why the delay should be acceptable and a conference with the Illinois Department of Public Aid. The State's Attorneys' Office refuses to attend the conference or respond to the Request for Explanation so that this process is usually ineffective. The State's Attorney further takes the position that there is no way to obtain state court review of the administrative delays under state law. Our only recourse to enforce these federal time limits in state court is §1983.

When Congress, the President and the Secretary of the Department of Health and Human Services adopted the Family Support Act and the regulations, they did so against the background of pre-existing §1983 decisions of this Court. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988). At the time the Act was adopted, it met all the §1983 construction canons used to determine whether a statute created rights enforceable under §1983. Title IV-D meets all the requirements set by every justice who has participated in the line of cases since Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, (1981). When Congress perceived that the Court strayed from §1983 jurisprudence in Suter v. Artist M., 112 S. Ct. 1360 (1992), it responded by passing the Suter override law. Improving Americas School's Act of 1994, Pub. L. 103-382, 108 Stat. 3518 (1994), codified at 42 U.S.C. § 1320(b)(13) (1994). This piece of legislation reaffirmed all prior Supreme Court interpretations and specifically rejected the exclusion of "State Plan" statutes from §1983 enforcement.

Moreover, §1983 was adopted for this precise situation when the States refused to obey federal law. At that time, it was the States' treatment of the freed slaves and the federal government's failure to intervene effectively to enforce their rights. In 1988, it was the failure of the States to enforce child support laws. The Child Support Enforcement Act of 1992, Pub. L. No. 102-537, 106 Stat. 3531 (1992), was adopted because of the failure of the States to protect a voiceless, voteless underclass of children in our society. In Monroe v. Pape, 365 U.S. 167, 180 (1961), this Court recognized the importance of §1983 when States fail to enforce their laws and federal laws because of

"prejudice, passion, neglect, intolerance or otherwise." Congress responded in 1988 to the breakdown in child support enforcement in the States by "turning federalism on its head" and transforming much of state family law into federal law. The passage of these laws and regulations was bipartisan and adopted by both the Republican and Democratic Administrations. Even under the dissent's position in Maine v. Thiboutout, 448 U.S. 1, 11 (1980) (Powell, J. dissenting), the Child Support Enforcement Act should be included in the "laws" enforceable under §1983 because it is akin to statutes enacted under the 14th Amendment.

The Act explicitly states that each state agency will comply with the time limits the HHS sets pursuant to Part 303 of 45 C.F.R.; however Illinois and other states miss the deadlines in nearly every case. It is common for mothers and their children to wait over five years without paternity being established, even though the State knows where the father lives and works. Delay is the enemy of the mothers and children and the friend of the reluctant fathers. Even though arrearages are occasionally levied against recalcitrant fathers, they can in no way compensate the children for the days and months of suffering they endured while they went without basic needs. Many, many children go through their whole childhood without any money being collected for their support, not even the minimum of $10.00 per month.

ARGUMENT

I. An Individual Enforceable Right Is Needed To Fulfill The Promise Of Title IV-D.

A. Congress was justified in creating a §1983 enforceable right in child support enforcement services.

The Court must affirm the Ninth Circuit's decision because individuals who are victims of delay in the child support enforcement programs would otherwise have no recourse. Freestone v. Cowan, 68 F. 3d 1141 (9th Cir. 1995). The current IV-D program victimizes its clients too often by disobeying federal deadlines. In its most recent audit, HHS determined that Illinois was not in substantial compliance in the areas of (1) establishment of paternity and support orders, and (2) review and adjustment of support orders. Further, HHS discovered that Illinois had no case management system, as required by 45 C.F.R. 302.15(a)(1) and 45 C.F.R. 303.2(c). Without a case management system, Illinois has no way of even knowing when deadlines expire. The Office of Child Support Enforcement, U.S. Department of Health and Human

Services, Report No. Il-95-PR/PM, Program Results Performance Measurements Audit, State of Illinois 2 (September 16, 1996).

Under Title IV-D all custodial parents, regardless of income, are entitled to representation in obtaining child support enforcement. While family law used to be the domain of the states, Title IV-D significantly altered the relationship between the states and the federal government. IV-D created a massive infusion of federal funds and federal control into state child support collection systems. Indeed, the state agencies created under Title IV-D are supposed to provide the child support enforcement services that used to be provided by private attorneys and legal aid lawyers. Thus, the child support enforcement program set up under Title IV-D is the largest legal aid service in the country. It is also the only legal service in the country permitted to operate in such an abysmal fashion.

From their very statement of the interests, the States' *Amici Curiae* have attempted to scare this court about the impact of the Freestone decision. The facts are far different from what the States present. Basically, Illinois in writing the States' *Amici Curiae* brief, would have this Court say that it may operate its IV-D program as it wishes, without regard to meeting the federal deadlines mandated by Congress, thereby rendering those time limits a dead letter. These deadlines were arrived at through the administrative process with significant input from the states. They reflect what would be good practice. Indeed, from the perspective of most practitioners familiar with the system, the current deadlines allow for far too much time.

Congress was justified in deciding that there needs to be a uniform system with standards applicable to each case because the law and processes in each state are very similar. Also, these deadlines are consistent with what should be expected of any lawyer representing a client (albeit generally long). Apparently, the States take the position that if they meet the deadlines in 75 percent of the cases, then they have done their job. But no private lawyer can say to his or her client, "Well, sure, I missed the deadline in your case, but I was in compliance with the deadlines in 75 percent of my cases, so you cannot sue me and recover for malpractice even though you I have failed." Worse, the fact is that the people who must suffer due to this unprofessional and ineffective conduct are children who live in poverty or will live in poverty if they do not receive child support from the absent parent.

Title IV-D and the time limit regulations set forth deadlines for each step of each case. For example, 45 C.F.R. §303.4 requires that "[w]ithin 90 calendar

days of locating the alleged father or non-custodial parent, regardless of whether paternity has been established, [the IV-D agency must] establish an order for support or complete service of process necessary to commence proceedings to establish a support order and, if necessary, paternity." The regulation clearly sets forth the time frame in which IV-D agencies must establish an order for support or complete service of process, yet this deadline is routinely missed. As a regular practice, the State's Attorney's Office of Cook County, Illinois[5] misses an overwhelming number of the deadlines.[6] This is not the way to run a law office. Effective attorneys do not violate established standards for minimal competence and performance. In any law office outside the sphere of IV-D agencies, such conduct would be grounds for dismissal or even malpractice liability.

When deadlines are missed, the child at issue is deprived three-fold: 1) he or she is deprived of the congressionally mandated right to know who his or her father is, 2) the child is deprived of the federally mandated legal services that the IV-D agency was to provide, and 3) the child is deprived of the financial assistance needed to provide for his or her needs. Our clients do not expect that in every case the states' efforts will be successful in obtaining child support, but they do expect the states to take each enforcement action with the mandatory deadlines set by the federal law.

A wide gulf exists between what the federal regulations require and what the Illinois IV-D agency actually does. This can best be understood by the example of Julie Rodriguez, who did not receive any child support enforcement for 13 years and no child support whatsoever either.

Seventeen years ago, Julie Rodriguez gave birth to a son, Richard. By December 1980, paternity had been established and a monthly child support order for $30 was entered. Shortly thereafter Richard's father ceased paying the order, and, true to form, the State's Attorney's Office took no steps to enforce it. An effective attorney would have acted when IDPA determined that the father was not paying his support obligations as required by 45 C.F.R. §303.6. Pursuant to §303.6, an effective attorney would have taken "any appropriate enforcement action . . . within no more than 30 calendar days"

[5]In many states, including Illinois, the State's Attorney's Office provides legal services to the IV-D agency.

[6]Office of Child Support Enforcement, U.S. Department of Health and Human Services, Report No. IL-95-PR/PM, Program Results/Performance Measurements Audit, State of Illinois 2 (September 16, 1996).

unless service of process was required. If service were required, an effective attorney would have taken an appropriate enforcement action "within no later than 60 calendar days." Instead, the State's Attorney's Office did nothing for 13 years. The State's Attorney's Office waited 158 times longer than the Federal Regulations permit. She repeatedly tried to contact her Assistant State's Attorney with no success.

When Ms. Rodriguez implored the State's Attorney's Office in 1995 to be effective advocates for her, the State's Attorney's Office again failed to perform competently in the most basic way by not communicating with her. Had an Assistant State's Attorney contacted her, the State's Attorney's Office would not have filed a second useless paternity action since paternity had already been established in 1980. An effective attorney would have "solicit[ed] necessary and relevant information from the custodial parent and other relevant sources and initiate[d] verification of information." 45 C.F.R. §303.2. An effective attorney would have done this either by interviewing Ms. Rodriguez and asking whether paternity had already been established, or actually checked the court records for the information. Instead, the State's Attorney's Office failed to do either and wasted court resources and precious time seeking to establish paternity - again.

The failure to communicate with the client is common with the State's Attorney's Office.[7] The Assistant State's Attorney handling the case often conducts the first interview with the client in the courtroom under oath before the judge, subject to cross-examination by the opposing party. An effective attorney would meet with her client privately, outside the courtroom, off the record, to secure the information necessary to advocate effectively for her client. Indeed, she would have prepared her client to testify. But that is not what the Assistant State's Attorney did here. Here, the Assistant State's Attorney learned, from the judge, for the first time, that paternity had already been established. Once the Assistant State's Attorney learned that paternity had been established and a support order was in place, she should have tried to enforce it. An effective attorney would have served the father's employer with a withholding order (45 C.F.R. §303.100), but that is not what the Assistant State's Attorney did here. Instead, the State's Attorney's Office failed to act at all and waited 15 years before taking any action.

[7]A Study of the Cook County State's Attorney's Child Support Enforcement Division, Chicago Council of Lawyers, October, 1995.

The Assistant State's Attorney also learned that the court had modified the $30 per month support order down to $15 per month in 1984. An effective attorney would have initiated a review of the support order to determine if it should be modified upwards given the father's employment. 45 C.F.R. §303.8. But that is not what the Assistant State's Attorney did here. The State's Attorney's Office still has not taken such action.

Conspicuously absent from this argument is precisely what the State's Attorney's Office did do over the course of the 13 years it failed to enforce child support payments for Ms. Rodriguez and Richard. That is because in Illinois, the State's Attorney's Office uses a "team approach" to child support enforcement. The State's Attorney's Office never knows at any point in time exactly which attorney is handling a case; under the team approach, a different attorney handles the case each time it requires legal action and no one Assistant State's Attorney has long term responsibility.

A professionally competent law firm or legal aid office would not operate in this fashion. When a mother calls to speak with her lawyer, the office knows who is working on her case. This is not what happens in the State's Attorney's Office. Indeed, many files have been lost in the State's Attorney's Office because no tracking system was in place until quite recently. The Assistant State's Attorneys do not know themselves whether the State's Attorney's Office will require them to appear in court on a particular day on behalf of a client they have never met and about whom they know nothing.

B. Illinois' Track Record Exemplifies The Need For A §1983 Remedy

Illinois' track record for child support enforcement collections is abysmal. Over the past decade, Illinois has perpetually violated 42 U.S.C. §602(27). From April 1, 1994 through March 31, 1995, the Department of Health and Human Services audited Illinois' Division of Child Support Enforcement (DCSE). Out of the 251 cases HHS originally selected to include in the audit, 25% were excluded for a variety of reasons (e.g., insufficient information, fathers who lived out of state, and fathers who were economically unable to meet the enforcement orders, and cases that DCSE failed to closed). HHS then looked only at those cases where DCSE possessed solid information, where clients were cooperative and fathers were financially able to make support payments. The results revealed that DCSE managed to establish Paternity and Support orders in only 71% of the cases. DCSE Audit at 1. HHS explained that this low efficiency rate reflected that DCSE failed to even attempt service

of process in many cases and refer numerous cases to the State's Attorney even after they located the father. Additionally, HHS found that Illinois was only able to meet the statutory requirements for review and adjustment of child support orders in a mere 64% of its cases. DCSE Audit at 1. Moreover, HHS determined that DSCE fails to keep the adequate records required to provide mothers and children efficient and effective service. DCSE Audit at 14. The audit also determined that Illinois maintained inadequate records for most cases and that DCSE's computer system was unable to track significant case events. These statistics indicate that severe systemic problems exist in Illinois' IV-D agency. Because Illinois fails to accomplish the most basic tasks necessary to put mothers and their children in position to receive child support payments, it only collects $2.30 for every $1 spent on the program. If Illinois managed to collect at the national average, it could expect to recover at least $100 million more in child support (as based on 1994 figures).

The results of HHS's audit indicate that the cases we see in the Mandel Legal Aid Clinic are anything but anomalies. In fact, Linda LaFine's case is a perfect example of HHS's findings. For over 14 years, Illinois' IV-D agency failed to collect a *single* child support payment for Mrs. LaFine and her children. The agency failed to take appropriate steps to enforce the child support order, lost tract of the absent parent on several occasions and subsequently failed to timely locate him, his assets, his employer or sources of income. Even more troubling is that the IV-D agency knew that the father had assets in excess of $100,000 and still failed, even when they had the father in court, to take the proper legal action necessary - whether by pursuing contempt proceedings, or simply opposing the granting of a continuance - to ensure that the child support order was enforced. But most troubling is that the IV-D agency maintains it has done nothing wrong and cannot be held accountable for anything that has occurred in Mrs. LaFine's case.

Burnadine Dunn's case represents yet another example of Illinois' poor efficiency rate for establishing paternity and support orders. Here, Illinois deprived a mother and child of child support payments for 4 years by needlessly dragging the case through the court system in an attempt to establish paternity. This action was completely unnecessary since Ms. Dunn was married to the child's father at the time of conception resulting in a presumption of paternity once the baby was born.

Then there is Petra Rivera's case. This case illustrates Illinois' failure to keep adequate records and communicate pertinent information to clients. In this

case, the father moved for a downward modification of the child support order. At that point he was already $2,007 in arrears to Ms. Rivera and owed the state $746. The court granted the father's request and entered an order below statutory guidelines. Ms. Rivera did not attend the modification hearing. Neither Illinois' IV-D agency nor the State's Attorney's Office notified Ms. Rivera that a modification hearing was scheduled or that she had a right to appeal the decision. During the past year and a half, the father of Ms. Rivera's children has been working off and on and Illinois has known when and where he was working. At no point has Illinois served the father to begin the withholding process.

Because Illinois has a poor computer system and is unable to track significant events, Ria Cloutier and her children lost child support payments when Illinois failed to pursue enforcement when Mr. Cloutier began receiving unemployment benefits. Worse yet, after repeated phone calls, all initiated by Ms. Cloutier to learn what she must do, if anything, to secure these payments, an individual in DCSE told Mrs. Cloutier that there was nothing they could do to enforce the order against Mr. Cloutier's unemployment insurance benefits. That was completely wrong information which reveals Illinois' deliberate indifference toward enforcing mothers' and children's right to child support enforcement. The State merely had to comply with 45 C.F.R. §303.7 to provide Mrs. Cloutier and her children with proper enforcement of the order.

The Project routinely sees these types of cases in our office because Illinois fails to require even minimum competence or professional responsibility from the lawyers it uses to pursue child support. Illinois, through its policies and practices, mismanages the legal resources at its disposal to the injury of the rights of children and their mothers by failing to meet federal deadlines.

II. Congress intended the requirements in Title IV-D and the corresponding regulations to create enforceable rights under all the opinions (majority and dissents) in the Maine v. Thiboutout line of cases .

A. Under the reasoning of all the Justices' opinions who have written on the subject of §1983, Title IV-D creates a right enforceable under §1983.

Examination of all the opinions, addressing which statutes are enforceable under §1983, including all dissents, shows that Title IV-D creates enforceable rights under every test this court has identified. Both the express language of

Title IV-D and the corresponding federal regulations, as well as the legislative history require recognition of a §1983 right under all the Justices' views. Congress' recent enactment of the "Suter Override Bill" underscores Congress' clear intent to create a §1983 right to the child support enforcement services included in Title IV-D. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994), codified at 42 U.S.C. §1320(b)(13) (1994). The new Welfare Reform Act makes clear that full compliance with time limits for each individual is required, not just "substantial compliance", which was taken out of the statute. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). Even under the dissent in Maine v. Thiboutout, Title IV-D is the type of statute that §1983 is intended to enforce because it remedies unequal, class-based lack of enforcement of child support laws in the states. Title IV-D meets the legislative purposes of §1983 found in Monroe v. Pape, 365 U.S. 167, 180 (1981). Title IV-D recognizes the civil right for women and children to obtain child support through state enforcement.

1. Under the reasoning of Justice Brennan's majority opinion in Wright, Title IV-D creates a §1983 cause of action.

In Wright v. Roanoke Redevelopment and Housing Auth., 479 U.S. 418 (1987), the Court elaborated the standards initially set in Pennhurst for determining when a cause of action lies for statutory violations. These standards have been followed by the majority in all subsequent cases until Suter. Even in Suter, Chief Justice Rehnquist reaffirmed these principles while adding another one for Spending Clause statutes. Suter v. Artist M., 112 S. Ct. 1360, 1366 (1992). The Court in Wright recognized only two exceptions when a §1983 right would be unavailable for enforcement of a federal statute: (1) when the statute did not create enforceable rights within the meaning of §1983. Wright, 479 U.S. at 423 (citing Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 19 (1980)); and (2) where " 'the remedial devices provided . . . are sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under §1983' " Id. at 424 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 20 (1981). The first prong will be addressed in this part, and the second prong will be analyzed in the next section of this brief.

The Wright court went on to define an enforceable right by relying on Pennhurst to determine whether the statute provided mere findings or legislative

preferences (just a nudge in the preferred direction) or whether the provisions were meant to be mandatory for the intended beneficiaries. Wright, 479 U.S. at 422. In Wright, the Court found that the language of the Brooke Amendment regarding rent ceilings in public housing projects was mandatory and intended to benefit individual beneficiaries. Wright, 479 U.S. at 429-30. Specifically, the Court recognized that tenants would be charged as rent "no more and no less than 30% of their income." Id. at 429-30.

The Court also concluded that the language at issue was not "too vague and amorphous" to be judicially enforceable and binding. Id. at 431-32. The regulations provided that a "reasonable" amount of utilities was includable in rent. Since the regulations "specifically set out guidelines that the PHAs [state agents] were to follow in establishing utility allowances, and they require notice to tenants and an opportunity to comment on proposed allowances," the concept of reasonable utilities was "sufficiently specific and definite" so as to be judicially enforceable. Id. at 431-32. In the instant case, Title IV-D standards are likewise concrete and not "vague and unenforceable." Indeed, Title IV-D regulations are even more specific and enforceable than those in Wright. A judge has only to glance at a calendar to determine if a state agency has taken the required steps within the time limits specified. For example, the judge might have to determine whether the IV-D agency did "[w]ithin 90 calendar days of locating the alleged father, . . . establish an order for support or complete service of process necessary to commence proceedings to establish a support order . . . (or document unsuccessful attempts to serve process, in accordance with the State's guidelines defining diligent efforts . . . .)" 45 C.F.R. §303.4 (d). As the recent audit report found, Illinois' lack of the federally mandated case management system prevents Illinois from determining if it has even met deadlines like this.[9] The opinion in Wright places special emphasis on the presence of guidelines in the statutory scheme. Here, we do not have mere guidelines. Title IV-D contains specific, numerical deadlines.

2. Under the reasoning of Justice O'Connor's dissenting opinion in Wright, Title IV-D creates a §1983 cause of action.

Under Justice O'Connor's dissenting opinion in Wright, Title IV-D also would create a §1983 cause of action (Justice O'Connor's opinion was joined

[9]Office of Child Support Enforcement, U.S. Department of Health and Human Services, Report No. II-95-PR/PM, Program Results Performance Measurements Audit, State of Illinois 2 (September 16, 1996).

by Chief Justice Rehnquist, Justice Powell and Justice Scalia). Wright, 479 U.S. at 432 (O'Connor, J., dissenting). Justice O'Connor adopts the majority's test, but disagrees with its application. The dissenters look only to the legislative action and history to determine whether Congress meant to establish mandatory duties to individuals. Justice O'Connor's dissent centered around her position that " 'the key to the inquiry is the intent of the Legislature' " as distinguished from regulations adopted by the Secretary. Id. at 433 (quoting Sea Clammers, 453 U.S. at 13). Under this approach, the Court first examines the statutory language "to determine if it is 'phrased in terms of the persons benefited' " and is written "in mandatory rather than precatory terms." Id. (quoting Cannon v. University of Chicago, 441 U.S. 677, 692 n. 13 (1979)).

Title IV-D qualifies under Justice O'Connor's analysis in Wright. Section 652 of Title 42 of the United States Code lists the duties of the Secretary and is replete with mandatory language, prefacing each duty with the word "shall" and including mandatory language within the actual duties. Most notably, the Secretary "shall review and approve state plans;" 42 U.S.C. §652(a)(3); "shall evaluate the implementation of state programs. . . [and] conduct such audits of state programs . . . as may be necessary to ensure their conformity with the requirements of this part; 42 U.S.C. §652 (a)(4); and to ensure compliance with "[t]he standards required by subsection (a)(1) . . . shall include standards establishing time periods." 42 U.S.C. §652(h). Congress, in turn, required that the State plan "must provide that the state will comply with such other requirements and standards as the Secretary determines to be necessary to the establishment of an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments." 42. U.S.C. §654(13). Congress thus explicitly bound the Secretary to enforce state compliance with the Title IV-D and bound the states, after the "Suter Override Bill," to obey and enforce the tests made of the state plan. Justice O'Connor concluded that Congress did not create an enforceable §1983 right in the Brooke Amendment because the statutory language does not explicitly create a right to utilities in rent. Wright, 479 U.S. at 433-34. The dissenters believed that the legislative history showed that Congress considered and rejected a proposal to create an enforceable right to "reasonable utilities." Id. at 434.

In Wright, Justice O'Connor evinced the concern that "once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplates such a

result." Id. at 438. Here, Congress clearly contemplates that mothers and children have rights to prompt child support enforcement services. Congress specifically required that state child support enforcement program standards "shall include standards establishing time limits governing the period or periods within which a state must accept and respond to requests . . . for actions in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards. 42 U.S.C. §652(h). Here, unlike the situation in Wright, where Justice O'Connor determined it to be unclear whether utilities were included in rent, Congress laid out in detail the services that state agencies must perform in specified time periods. HHS regulations show that they have not been "unleashed from any connection to congressional intent," as Justice O'Connor determined to be the case in Wright. Wright, 479 U.S. at 438.

Thus, here, not only was Congress explicit as to which services IV-D recipients had rights to, but HHS regulations reiterated that same intent.

3. Under the reasoning of Justice Stevens' majority opinion in Golden State, Title IV-D creates a §1983 cause of action.

Writing for the majority in Golden State Transit v. City of Los Angeles, 493 U.S. 103 (1989), Justice Stevens applied the two-part test in Wright. (Also see Wright, 479 U.S. at 448-49; Golden State, 493 U.S. at 106). Justice Stevens noted that in determining whether a right exists, the Court has "asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." Golden State, 493 U.S. at 106 (quoting Wright, 479 U.S. at 430). Justice Stevens relied on the same position in his dissent in Suter.

4. Under the reasoning of Justice Kennedy's dissenting opinion in Golden State, Title IV-D creates a §1983 cause of action.

Justice Kennedy concluded that the NLRA did not create a §1983 remedy because "the only wrong committed by the state or its local entities is misapprehending the precise location of the boundaries between state and federal power." Golden State, 493 U.S. at 114 (Kennedy, J., dissenting). In the instant case, Congress' language "secures" Title IV-D individual rights. Title IV-D gives custodial parents and children rights to child support enforcement from the state. The individual rights-creating language of the new Welfare Reform Act is especially illustrative, requiring that a state will provide child support enforcement services to "*each child*" already receiving certain

state services and "any other child" with an application on file. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105, §301(A) (1996). Further, §301(B) extends coverage to "the custodial parent of such a child." §301(B). Thus, any child and their custodial parent has a right to the state's child support enforcement services. Moreover, there is no preemption issue at stake here as had existed in Golden State. Title IV-D itself creates all the rights.

5. Under the reasoning of Justice Brennan's majority opinion in Wilder, Title IV-D creates a §1983 cause of action.

In writing for the majority in Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990), Justice Brennan applied the Wright test in holding that healthcare providers had a right, secured under §1983, to payments based on reasonable and adequate rates. Justice Brennan cites the provisions "establish[ment] [of] a system for reimbursement of providers" and its "phras[ing] in terms of benefiting healthcare providers" as support for his conclusion that there was "little doubt" that healthcare providers were the intended beneficiaries of the statutory scheme. Wilder, 496 U.S. at 510. Likewise, Title IV-D establishes a system for providing child support enforcement services to mothers and children and is phrased in terms clearly benefiting mothers and children.

6. Under the reasoning of Chief Justice Rehnquist's dissenting opinion in Wilder, Title IV-D creates a §1983 cause of action.

Writing for the dissent in Wilder, Chief Justice Rehnquist concluded that a §1983 remedy was not available under the Boren Amendment to the Medicaid Act. Wilder, 496 U.S. at 524 (Rehnquist, J., dissenting). In reaching his conclusion, the Chief Justice worked from the premise, as the Court had done in Wright, that "[f]or a §1983 remedy to lie, the language used by Congress must confer identifiable rights." Id. at 526. In finding that medical providers had not been conferred identifiable rights, the Chief Justice determined that the structural evidence (the provision at issue was the thirteenth listed requirement for in the State plan provision without clearly conferring any substantive rights on the providers) and the absence of "any express 'focus' on the providers [plaintiffs] as the beneficiary class" indicated that Congress had not intended to confer such rights to the class of providers. Id. at 527.

In Wilder, patients, not providers, were the intended beneficiaries of the Medicaid Act. Here, the statute is explicit that the intended beneficiary class

is mothers and children. In fact, the Authorization of Appropriations section, 42 U.S.C. §651, places "express focus" on mothers and children. Congress appropriated money "[f]or the purpose of enforcing support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance will be available under this part to all children." 42 U.S.C. §651 (1996).

Congress' intent to vest in mothers and children the right to prompt child support enforcement services is even clearer given Congress' subsequent action. In 1988, dissatisfied with state performance, Congress enacted what later became 42 U.S.C. §652 (h), entitled "Prompt State response to requests for child support assistance." 42 U.S.C. §652(h) (1996). Under the provision, Congress required that the Secretary shall adopt "standards establishing time limits governing the period or periods within which a State must accept and respond to requests . . . for assistance in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards." 42 U.S.C. §652(h) (1996). More recently, Congress has emphasized the individual nature of the rights conferred by removing provisions that separately dealt with IV-A and non IV-A beneficiaries and collapsing them into one provision. 42 U.S.C. §654(4), (6) (1995). Congress thus underscored that "each child" receiving aid under Title IV-A and "any other child" who has an application filed for him has a right to child support enforcement services. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (which replaces 42 U.S.C. §654(4)). Unlike the language in the Medicaid Act, Congress has expressed clearly that the intended beneficiaries of Title IV-D were mothers and children.

Chief Justice Rehnquist's indication that if all that was at issue was enforcement through §1983 of the process "set forth in the statute, he would allow §1983 to be used to enforce the process." In Wilder, the Medicaid Act left the *states* with discretion to develop a rate system. Wilder, 496 U.S. at 524. However, Chief Justice Rehnquist determined that under the majority's opinion, "every §1983 action hereafter brought by providers . . . will inevitably seek the substitution of a rate system preferred by the provider for the rate system chosen by the State." Id. "The court orders entered in such actions therefore will require the States to adopt reimbursement rate systems different from those Congress expressly required them to adopt . . ." Id. at 525.

Here, on the other hand, Congress did not delegate this authority to the states. The federal government retained control over the operation of state IV-D programs. In fact, dissatisfied with the states performance under more flexible standards, Congress instructed the Secretary to promulgate a system of absolute deadlines. Since Congress has chosen not to allocate its authority as it did in the Medicaid Act at issue in Wilder, the Chief Justice's concern that courts would be displacing congressionally enacted law with their own law is inapplicable. Rather, by enforcing the deadlines authorized by Congress and promulgated by the Secretary, the courts will be giving force to congressionally enacted law.

Moreover, Chief Justice Rehnquist concluded in Wilder that while the provider plaintiffs did not have a right to have anyone outside the state agency decide if they are receiving a reasonable rate, they may have a right to "bring a §1983 action to require that rates be set according to that process" that the federal government left to the states to develop. Id. at 527. Likewise, IV-D families merely claim that they have a right to the process that Title IV-D and the regulations create. IV-D families do not claim that they have a right to child support enforcement, which under the Chief Justice's analysis, the Wilder majority would hold here; rather, IV-D families are claiming that they have a right to the process of state provision of prompt child support enforcement services.

Finally, unlike the rights at issue in Wilder, denying a §1983 remedy would render Title IV-D and particularly 42 U.S.C. §652 (h) a "dead letter." In Wilder, the Chief Justice alluded to the "Secretary's oversight" as providing some relief. Id. at 528. In this case, the Secretary has never imposed a single sanction on a noncomplying state agency, despite a history of failure on the part of state child support enforcement programs. Moreover, in Wilder, as Chief Justice Rehnquist noted, the Boren Amendment changed the statutory scheme to "allow the States more latitude in establishing Medicaid reimbursement rates." Id. Here, Congress removed any latitude previously present in the statutory scheme by instructing the Secretary to create deadlines. 42 U.S.C. §652 (1996). To now refuse a §1983 remedy to IV-D beneficiaries would thus contradict clear congressional intent and render Title IV-D a "dead letter", leaving federal time limits without any power to enforce them.

7. Under the reasoning of Chief Justice Rehnquist's majority opinion in Suter, Title IV-D creates a §1983 cause of action.

In Suter, the majority ruled that the Adoption Assistance and Child Welfare Act (the "Adoption Act") did not create enforceable rights under §1983. Suter v. Artist M., 503 U.S. 347 (1992). The Court found that the Adoption Act only required the State to file a plan that sets forth the 16 listed features but did not require actual compliance with the plan. Id. at 357. In explaining why the Adoption Act does not require more than a proper written plan, Justice Rehnquist wrote that "[t]he regulations promulgated by the Secretary to enforce the Adoption Act do not evidence a view that §671(a) places any requirement for state receipt of federal funds other than the requirement that the State submit a plan to be approved by the Secretary . . . What is significant is that the regulations are not specific and do not provide notice to the States that failure to do anything other than submit a plan with the requisite features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government." Id. at 361-62.

Unlike the provisions in Suter which gave no guidance to measure "reasonable efforts", Title IV-D imposes specific, numerical deadlines on the states. Importantly, this direction to the secretary is in a different section of Title IV-D than the section setting out the State requirements. Title IV-D requires that States take specific steps in order to establish paternity and enforce child support. To obtain approval and ultimately federal funding, a State must not merely submit a State plan under IV-D, but must also agree to comply with Title IV-D and its corresponding regulations. 42 U.S.C. §652(13) provides: "A state plan must provide that the state will comply with such other requirements and standards as the Secretary determines to be necessary." In the contract annually entered into between each state and HHS, the Governor of each state must sign a statement again agreeing to comply with Title IV-D.[9] This certification appears on the signature page itself. Moreover, the requirement that the Governor certify compliance each fiscal year before release of federal funds underscores that Congress did not merely require states to make assurances that they would comply. Rather, States must actually comply on a continuing basis to receive federal funds. If compliance were just a goal and not a requirement, Congress would not have required annual

[9]PL 104-193 Section 402 (a) provides: "[T]he term 'eligible State' means, with respect to a fiscal year, a State that . . . has submitted to the Secretary a plan that the Secretary has found includes the following:
(2)-A certification by the chief executive officer of the State that, during the fiscal year, the State will operate a child support enforcement program under the State plan approved under part D."

certification.

Indeed, Petitioner's argument suggests that Title IV-D is too burdensome for anyone, including reluctant fathers, to really expect that Title IV-D provisions will be obeyed. The States argue that compliance is overly burdensome on state financial and legal resources. Such an argument is akin to proposing that public defenders and prosecutors in the criminal context should not be held to any level of professional responsibility because doing so would be financially burdensome on the state. Such an argument is disingenuous, especially in the case of Title IV-D. First, the problem is not inadequate funding or too many cases, but poor management. Some states do much better. Pennsylvania collects $9.09 for every dollar expended. Michigan collects $8.43, while Illinois collected $2.36 and Arizona collected only $1.79 per dollar expended. States may opt not to participate in Title IV-D, participation in Title IV-D is not mandatory. Petitioner's argument that States' rights would be in danger if the Court were to allow a §1983 right is misleading because the States can simply opt out of Title IV-D if they object to its terms. In truth, what Petitioner is actually arguing is that this Court should find that Title IV-D places no burdens whatsoever on state actors (especially managers at the State's Attorney's Offices and legal administrators in the IV-D agency).

B. The recent passage of the Suter Override Bill underscores Congress' intent to create enforceable rights to the services included in Title IV-D.

That Title IV-D's requirements are binding is particularly clear given Congress' recent enactment of what is commonly known as the "Suter override bill."[10] Under the Act, states cannot comply by simply submitting a plan with the correct boilerplate language. The terms of the Plan must be obeyed. It is as if the words (the "State plan. . . must provide that") were excised from the text of Title IV-D and the remaining language ("The State will comply with such other requirements and standards as the Secretary determine to be necessary. . .", 42 U.S.C. § 654 (13)) is enforced. The states knew that they were agreeing to obey federal regulations setting time limits, not just submitting a written statement in the Plan agreeing to comply.

The bill provides: "In an action brought to enforce a provision of the Social

[10]Improving America's Schools Act of 1994, Pub. L. No. 103-382, 102 Stat. 5518 (1994), codified in 42 U.S.C. §1320(b)(13) (1994).

Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter but not applied in prior Supreme Court decisions respecting such enforceability . . ." Id.

Congressional history makes it clear that the Suter Amendment, 42 U.S.C. §1320 (a)(2), is designed to ensure that individuals who have been injured by a State's failure to comply with the federal mandates of the State plan titles of the Social Security Act are entitled to seek redress in the federal courts to the extent that they were able to prior to the decision in Suter. The House Committee reported that the Suter amendment is designed to achieve three results. It "(1) responds to the recent Supreme Court decision in Suter, which dramatically limited the ability of program beneficiaries to enforce the State plan titles of the Social Security Act; (2) preserves private causes of action as they existed before the Suter decision; and (3) reaffirms that the State plan titles of the Social Security Act impose binding obligations on participating States to comply with the requirements of the Act." See Conference Report on H.R. 11, 102nd Cong. 2nd Sess. 138 Cong. Rec. H. 12552 (October 5, 1992).

Even those who expressed reservations concerning the Suter amendment recognized that it allows intended beneficiaries of the Social Security Act to sue a State for its failure to provide the benefits that the plan promises and that the State agreed to fulfill in exchange for federal funds. For example, Representative Archer had reservations about the Act because of his understanding that the amendment would permit the right to sue if any State plan requirement is not actually met. See 102nd Cong. 2nd Sess., 138 Cong. Rec. H. 5950 (July 2, 1992). This Statement demonstrates that even those in Congress who expressed opposition to the Suter amendment understood that its intention was to permit beneficiaries of the Social Security Act a broader right than Suter would allow to sue participating states.

The majority of the courts that have addressed the issue have read the amendment to reject the Supreme Court's reasoning in Suter and to require courts to return to the pre-Suter approach when deciding whether to recognize a private cause of action to enforce provisions of the Social Security Act other than §671(a)(15). See Marisol A. v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996); Harris v. James, 883 F. Supp. 1511, 1520 (M.D. Ala. 1995); Jeanine

B. ex rel. Blondis v. Thompson, 877 F. Supp. 1268, 1285 (E.D. Wis. 1995). In Jeanine B., the Court explained what would appear to be the common understanding of the amendment's effect:

> the amendment overrules the general theory in Suter that the only private right of actions available under a statute requiring a state plan is an action against the state for not having that plan. Instead the previous tests in Wilder and Pennhurst apply to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries.

Id. at 1283.

C. Title IV-D is enforceable under the Dissent in Maine v. Thiboutout.

In Maine v. Thiboutout, 448 U.S. 1, 19 (1980) (Powell, J., dissenting), Justice Powell dissented in an opinion in which then Justice Rehnquist joined, from the Court's conclusion that federal statutes other than civil rights statutes may be enforced under §1983. The opinion recognized that a major purpose of the Reconstruction Era Civil Rights Acts "was to involve the federal judiciary in the effort to exert federal control over state offices who refused to enforce the law." Id. at 33. Here, Congress reacted to the failure of the states to enforce their child support laws by passing Title IV-D and creating a massive federal/state program. Indeed, IV-D was adopted in response to a violation of equal rights of a class overwhelmingly composed of women and children. The class of men were the beneficiaries of unequal government enforcement of the laws. Title IV-D changed many state laws that unduly discriminated against mothers and children and in favor of reluctant fathers. (Indeed, some fathers even became proud "deadbeat dads" for evading collection efforts).

Later, Congress found the performance of the states to be inadequate and ordered the Secretary of the Department of Health and Human Services to adopt standards setting deadlines for performing various child support functions in each case. Congress acted because of state failures to enforce state family law in a prompt fashion. Justice Powell's reliance on Monroe v. Pape shows that even under his dissent in Maine, Title IV-D is enforceable under §1983. After all, Monroe found that §1983 was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the fourteenth amendment might be denied by the state agencies." Monroe, 365

U.S., 167, 180 (1961). Title IV-D was passed for this very reason. Monroe also found that §1983 was adopted because state officials were *unable* or *unwilling* to enforce a state law.

D. Title IV-D focuses unmistakably on custodial parents and their children as beneficiaries of the federal funding.

First, there can be no doubt that Title IV-D is intended to benefit families with children. The first section of Title IV-D includes among its purposes for enactment "enforcing the support obligations owed by absent parents. . . and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for [AFDC] for whom such assistance is requested" 42 U.S.C. §651.

Amici in support of the Petitioner (hereinafter "*Amici*") assert that children and custodial parents are not the "especial beneficiaries" of the services mandated under Title IV-D as required by the Wright-Wilder test for establishing "a right under federal law" enforceable under §1983.[11] This argument has been rejected by every Circuit which has considered the issue save one.[12] It is refuted by the statutory language, legislative history, the policy statements of the federal Office of Child Support Enforcement and a common sense view of the intended operation of Title IV-D.

Amici argue that Title IV-D is aimed at reduction and avoidance of welfare costs but then insist on the non-sequitur that children and their custodial parents cannot be intended to be benefitted thereby. However, recoupment of welfare benefits and avoidance of welfare enrollment can only be accomplished if children receive *effective* child support services. To achieve the goals of the Title IV-D, the Petitioner and her fellow state IV-D directors must produce actual results--the collection of child support. The Respondent class of custodial parents here have sued for timely services and are fully aware that support collections may not result in every case. However, neither the congressionally desired benefits to children who avoid the welfare system and who may be lifted out of poverty, nor reduction in welfare costs, can be achieved if Petitioner does not provide the timely services to each family as

[12]State's brief at 6-12; *Amicus* brief of the American Public Welfare Association et al. at 27 n. 70; DA's brief at 25-26. Petitioner does not make this argument.

[13]See Albiston v. Maine Comm'n of Human Services, 7 F.3d 258 (1st Cir. 1983); Howe v. Ellenbacker, 8 F.3d 1258 (8th Cir. 1993); Carelli v. Howser, 923 F.2d 1208 (6th Cir. 1991); and Freestone; but see Wehunt v. Ledbetter, 875 F.2d 1558 (11th Cir. 1989).

required by federal law.

The Secretary requires specific action in compliance with the deadlines at every critical step in providing child support services. For example, the first step is often the location of a noncustodial parent or putative father "*For all cases*... the IV-D agency *must* attempt to locate all absent parents or sources of income and/or assets when location is necessary to take necessary action. Under this standard the IV-D agency must [u]se the appropriate location sources. . ." 45 C.F.R. §303.3(b) (1996) (emphasis added). If location efforts are unsuccessful, the IV-D agency must "[r]epeat the location attempts. . . either quarterly or immediately upon receipt of new information." Id. "For all cases" is used in most of the 45 C.F.R., Part 303 regulations.

Delays and denials of services constitute violations of specific regulations, not dissatisfaction with timely support services which were unsuccessful. Petitioner cannot blame the noncustodial parent for the agency's repeated loss of files or its failure to act on new location information provided by a custodial parent to establish or enforce an order for support (45 C.F.R. §§303.4(d), 303.6(c)(2)); its failure to act when a wage withholding payment is not received (45 C.F.R. §§303.6(a) and (b)); its failure to attempt to effectuate a wage withholding order when obligated parent becomes delinquent (45 C.F.R. §§ 303.6(c), 303.100) or its failure to timely and accurately distribute support it has collected (45 C.F.R. §§ 303.32, 302.51). Petitioner has never contended that these were unusual or isolated errors and the record on summary judgment demonstrates that the Petitioner systematically deprived children of these services. See Freestone v. Cowan, 68 F. 3d 1141, 1144-45 (9th Cir. 1995).

Moreover, DCSE specifically rejected IV-D agency assertions that they should not be held to specific tasks and time limits and determined that the requirements are realistic and necessary for the states to achieve. DCSE stated:

> Given the extent of comments about how many different entities are involved in IV-D process, lack of adequate case management processes in many IV-D programs and delays in providing services, we believe that setting specific time frames for each step of the process will ensure States provide necessary services on a timely basis.

54 Fed. Reg. 32284, 32290 (Aug. 4, 1989).

The regulations are very clear that children would and should benefit from the services required of the IV-D agencies.

III. Recognition by this Court of a §1983 cause of action will not result in a flood of the federal courts.

The States *Amici* claim that recognition by the Court of a §1983 cause of action for child support enforcement will flood the federal courts. This is flatly untrue. State courts, not federal courts, will hear the lion's share of these §1983 suits. Furthermore, state courts themselves will not be flooded by recognition of a §1983 cause of action. At the time a §1983 violation arises, the parties will already be or will eventually be in state court on the underlying child support case. A §1983 suit can simply be consolidated into that core child support suit. The practical realities are such that the courts will not be overrun. Legal aid lawyers representing mothers have neither the money, time nor staff to contribute more than a trickle to court dockets. This Court's recognition of a §1983 action will give families hope and empower women to regain control of their lives. Indeed, there will need to be some class actions to correct systemic failures but there will be no flood of litigation.

A. IV-D federal enforcement is deficient on paper and a 'dead letter' in practice.

In practice, states have never been held to the funding conditions imposed by Title IV-D. No state has ever been penalized. Illinois, for example, is woefully out of compliance as recently as the audit that was just released in September, 1996 shows. In Suter, Chief Justice Rehnquist recognized that §1983 was important for private plaintiffs to keep statutory provisions from being rendered "a dead letter." Suter, 503 U.S. at 360-61.

Title IV-D is a "dead letter" that requires §1983 enforcement. Although HHS theoretically has the power to impose sanctions or reduce state funding, the Secretary has *never* seen fit to use its power despite extensive state violations. The audit/penalty provision allows states to pass in and out of substantial compliance without actually improving the operation of their IV-D programs, much less obtaining child support within the mandatory deadlines. There are no remedies whatsoever for individual custodial parents who have waited years to obtain child support enforcement services more quickly. Enforcement of Title IV-D rights is a "dead letter."

B. Illinois' record with HHS demonstrates the failure of Title IV-D.

Illinois' record is illustrative. Illinois has a record of repeated noncompliance throughout the past decade, without a single reduction in funding. Illinois

shows how the states fail to meet the requirements set by the federal government. The Department of Health and Human Services recently conducted an audit of the Illinois Division of Child Support Enforcement from April 1, 1994 through March 31, 1995. The audit first excluded about 25% of the cases that had problems (insufficient information, father's who lived out of state, and fathers who were economically unable to meet the enforcement orders). The audit then looked at only those cases where the Illinois' DCSE had solid information, cooperative clients, and fathers who were financially able to make support payments. The audit determined that Illinois' DCSE failed to establish paternity and support orders on time in 29% of these cases. The audit explained that this low efficiency rate reflected the failure of Illinois' DCSE to even attempt service of process in many cases and the failure to refer numerous cases to the State's Attorney even after the father was located. The audit also determined that Illinois' DCSE failed to meet the statutory requirements for review and adjustment of child support orders in 36% of the cases. Furthermore, the audit determined that inadequate records were maintained for most cases, and the computer system was unable to track significant case events.

Illinois for the States' *Amici* takes the position that it is not obligated to enforce federal child support deadlines on an individual basis. This is not surprising since Illinois has also opposed every effort to use state administrative or judicial remedies to enforce the federal time limits. At every effort in state courts and agencies, the Illinois Attorney General asserts there are no state-created remedies to enforce the federal deadlines.

In response to an avalanche of complaints, the Illinois Legislature established an administrative accountability process in which individuals have a right to discuss Illinois' failures in their individual cases and prospective actions to be taken in the future. But the Attorney General takes the position that these proceedings are only informational and not binding on the State. At most conferences the issue is the State's failure to meet federal deadlines, yet the Illinois Department of Public Aid refuses to discuss past failures and refuses to set deadlines to which it must adhere.

Without §1983, custodial parents cannot even obtain an explanation from the State's Attorney's Office about delays in their court cases. Although the State's Attorney is a contracting party receiving funds under IV-D and is defined as part of the Child Support Enforcement Unit which must provide an explanation upon the request of the custodial parent under Illinois law, the

Office refuses to do so. Also, it rebuffs requests that Assistant State's Attorneys appear at the conference which custodial parents can request when they do not receive a satisfactory explanation.

When mothers have turned to the state courts to force the State's Attorney's Office to attend these conferences, Illinois has escalated their stance from one of denial to active coercion. In court, the States' Attorney Office, who is under contract with Illinois to appear in court, moves to withdraw from the case. This is a blatant attempt by Illinois to deny its child support enforcement services to complaining mothers. Through this tactic, Illinois has placed mothers and children in an impossible position. If the mothers bend to the will of Illinois, they are unlikely to obtain child support anytime in the near future. If they continue to push for compliance, Illinois will remove the services which only Illinois can offer - services like interstate and locator services - services which are vital in many cases to obtaining child support. Fortunately, state courts have not allowed the State's Attorney's Office to withdraw from these cases.

C. Most §1983 litigants will turn to state, not federal courts to pursue their claims.

Since State courts have jurisdiction over official capacity actions for prospective relief, most §1983 cases will be brought in state, not federal, court. State courts have concurrent jurisdiction over suits brought under federal law. Maine v. Thiboutout, 448 U.S. 1, 3, n. 1 (1980); Martinez v. California, 444 U.S. 277, 283 n. 7 (1980). Further, state court must hear the same type of claims, Testa v. Katt, 330 U.S. 386, 393-94 (1947), and claims between similarly situated litigants, Howlett v. Rose, 496 U.S. 356, 380-81 (1990), as those suits under state and federal law that the state court does in fact entertain. State courts are thus obligated to entertain official-capacity suits for *prospective* injunctive relief. Will v. Michigan Dep't. of State Police, 491 U.S. 58, 71 n.10 (1989) (quoting Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985)). Because the 11th Amendment does not apply to suits for prospective relief, state courts will have jurisdiction over these §1983 suits.

§1983 claims against state IV-D officials will most likely be consolidated with the core child support litigation already in state court. Since most child support cases end up in the state courts, there will be few "unattached" §1983 suits. Under the present structure, a mother has a continuing action against a father from the moment a paternity suit is filed in state court until that father's

child reaches the age of majority. The presiding judge will have the power to consolidate the §1983 suit into the paternity suit. Even if a §1983 violation occurs before a child support suit is filed, state courts can consolidate the §1983 action into the support suit when it eventually ends up in court. Though some individuals may choose to bring §1983 actions in federal court, where the defenses may be different from those available in state court, at this stage the Court need not decide the scope of any defenses. The only issue is whether a §1983 cause of action to available.

D. The remedies provided under IV-D are not sufficient to override

Contrary to Petitioner's argument, Seminole Tribe v. Florida does not prohibit Respondents from suing a state officer in her official capacity. The Seminole Tribe Court declared that a "carefully crafted and intricate remedial scheme" evidences a Congressional intent to maintain state sovereign immunity and foreclose Ex parte Young access to the courts. See also Ex Parte Young, 209 U.S. 123 (1988). Seminole Tribe, 116 S. Ct. 1114, 1132 (1996). The Court's opinion in Seminole Tribe is inapplicable because Title IV-D is devoid of any "remedial scheme" whatsoever accessible to the beneficiaries of IV-D.

Petitioner claims that the audit and penalty scheme in Title IV-D meets the "carefully crafted and intricate remedial scheme" standard announced in Seminole Tribe. In Seminole Tribe, the remedial scheme was carefully crafted to provide a remedy to the beneficiaries, the Indian tribes, to displace the remedies under §1983. Here, the beneficiaries, the mothers and children, have no remedy - the audit is initiated by the Secretary of HHS and evaluates overall substantial compliance, at the 75% level, and not performance on each individual case.

E. Title IV-D Does *Not* Provide a Comprehensive Enforcement Scheme Foreclosing a Right of Action under §1983.

A statutory remedial scheme that provides *no* remedy for the violation of rights created in favor of one of the statute's two express beneficiaries certainly can*not* be considered, by any stretch of reason, to be sufficiently comprehensive to foreclosure of §1983 actions. Nevertheless, Petitioner argues that the remedial scheme is "sufficiently comprehensive" so as to foreclose a cause of action under §1983, even though the scheme leaves the statute's express beneficiaries without any method, means or avenue for enforcing rights granted in mandatory terms under the plain language of the statute. However,

Petitioner's argument is both contrary to precedent and illogical.

The "sufficiently comprehensive remedial scheme" exception was established in Middlesex County Sewerage Auth. v. Nat'l. Sea Clammers Ass'n., 453 U.S. 1 (1981). However, the remedial scheme addressed in Sea Clammers consisted of elaborate enforcement provisions that included explicit civil and criminal penalties for violation of the statute and granted any interested party the ability to seek judicial review of any administrative determination. Sea Clammers, 435 U.S. at 13-14. In contrast, the limited remedial scheme provided by Title IV-D contains no such comprehensive or elaborate enforcement provisions from which a valid inference that Congress intended to foreclose §1983 actions can be drawn. Title IV-D provides no civil or criminal penalties for violation of its provisions or of the federal regulations promulgated under it. In truth, Title IV-D's limited remedial scheme provides only financial disincentives, up to a maximum 5% reduction in federal matching funds, to be levied by the Secretary of Health and Human Services to deter the continued violation of Title IV-D provisions. According to The *Amici Curiae* Brief of the State of Illinois, such financial penalties have never been levied against any of the several states (*Amici Curiae* Brief of the State of Illinois at footnote 8) even though the "actual child support collection rate nationally is only 18%." Petitioner's Brief on the Merits at 19. How can such a remedial scheme be construed as comprehensive or effective?

Since Sea Clammers, few statutes have been found to contain comprehensive enforcement schemes that preclude or foreclose an action under §1983. The "sufficiently comprehensive" exception to the general rule that plaintiffs may bring §1983 causes of action for violations of federal statutes has been viewed as a narrow one. Wright v. City of Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423-24 (1987). Since the Sea Clammers decision, only one other case -- Smith v. Robinson, 486 U.S. 992 (1984) -- has held that a statute itself provided a remedial scheme "sufficiently comprehensive" to foreclose an action under §1983. A distinguishing feature of these two remedial schemes found "sufficiently comprehensive" to preclude actions under §1983 is that both of these schemes included express private remedies that allow citizens to compel state action when the state violates the federal statutory requirements.

In Wright, the Court squarely rejected the argument that enforcement schemes are "sufficiently comprehensive" so as to foreclose §1983 actions, when those schemes provide solely for detailed audits and limited fiscal

penalties to deter violations of the statute and fail to include express private remedies or to specifically authorize parties to seek judicial review of administrative determinations. In Wright, the Court also rejected the argument that the existence of other possible state court remedies in favor of the plaintiff would bar §1983 causes of action. The Wright Court reasoned that the existence of a state court remedy is hardly a sufficient reason to bar an action under §1983, which was explicitly adopted for the purpose of enforcing federal rights. Wright, 479 U.S. at 429.

Further, the Court has repeatedly held that administrative enforcement schemes, such as the one included in Title IV-D must be presumed to parallel the private §1983 action, rather than occupy the same ground. In Rasodo v. Wyman, 397 U.S. 397 (1970), the Court held that the Secretary's authority to withhold funds does not preclude private actions to enforce individual rights under Title IV-D. The court stated, "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program" Id. Finally, in Wright, 479 U.S. at 428 the Court held that the Secretary's authority to audit, enforce annual contributions contracts, and cut off federal funds are generalized powers that are insufficient to indicate a congressional intention to foreclose §1983 remedies.

CONCLUSION

For the reasons set forth in this brief, the Anti-Poverty Project of the Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, as *Amicus Curiae*, requests this court to affirm the judgment of the Court of appeals.

Respectfully submitted,

GARY H. PALM
Counsel of Record
Attorney for Amicus Curiae,
The Anti-Poverty Project
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
In Support of Respondent

January 6, 1997

STATE OF ARIZONA

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October 8, 1996

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Dear Mr. Palm:

Pursuant to your request, on behalf of the Petitioner in *Blessing v. Freestone*, No. 95-1441, I consent to the filing of an *amicus curiae* brief by The Edwin F. Mandel Legal Aid Clinic.

Sincerely,

Tim Delaney
Solicitor General

CTD:sl

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October 9, 1996

Gary Palm
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Re: *Blessing v. Freestone*
U.S. Supreme Court No. 95-1441

Dear Gary:

This is to confirm that I consent to the filing of an amicus curiae brief by the Mandel Legal Aid Clinic of Chicago on behalf of respondents in the above-entitled matter.

Sincerely,

Marsha S. Berzon

MSB/jh

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